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Supreme Court of the United States

October Term, 1997

PAUL W. BERGER AND
ERMA R. BERGER,

Cross-Petitioners,

v.

CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER AND JACK HAMANN,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED

1. Do the media violate the Electronic Communications Privacy Act of 1986 (the Wiretap Act) by surreptitiously recording conversations through a hidden microphone worn by a law enforcement agent who enters a private residence beyond the scope of the search warrant's authority?

2. Are the media entitled to perpetually republish or sell video and audio recordings, or is an injunction appropriate, where there is a final judicial determination that the media unlawfully obtained the video and audio recordings in violation of the Constitution or laws of the United States or any state?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 5

A. Factual Background 6

B. Basis for Federal Jurisdiction Below 11

REASONS WHY THE WRIT SHOULD BE GRANTED 16

I. THE MEDIA VIOLATED THE WIRETAP ACT WHEN THEY ENTERED THE BERGERS' PRIVATE RANCH AND RESIDENCE BY INSTALLING A HIDDEN MICROPHONE ON A GOVERNMENT AGENT TO SURREPTITIOUSLY RECORD PRIVATE CONVERSATIONS 16

A. Agent Scrafford was acting as a human "boom mike" for the Media and not an Agent authorized under "color of law" 18

B. The Media's recording was not for any legitimate law enforcement purpose but to criminally and tortiously violate the Bergers' rights 21

II. THE MEDIA SHOULD NOT BENEFIT IN PERPETUITY FROM THE FRUITS OF NEWSGATHERING PRACTICES THAT VIOLATE THE CONSTITUTION 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

FEDERAL

CASES

Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995) 13

Berger v. New York, 388 U.S. 41 (1967) 17

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 11, 18, 26

Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) 13

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 25

Desnick v. American Broadcasting Co., Inc., 44 F.3d 1345 (7th Cir. 1995) 20

Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) 15, 23

Florida Star v. B.J.F., 491 U.S. 524 (1989) 25

Fultz v. Gilliam, 942 F.2d 396 (6th Cir. 1991) 23

Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) 26

Gelbard v. United States, 408 U.S. 41 (1972) 17

Ginn v. Matthews, 533 F.2d 477 (9th Cir. 1976) 13

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 12

Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983) 13

Katz v. United States, 389 U.S. 347 (1967) 17

New York Times Co. v. United States, 403 U.S. 713 (1971) 25

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) 25

Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993) 15, 16, 19, 20, 21, 22

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. I. 5, 25

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. XIV 19

United States Code, Title 18

§ 2510 ..... *passim*

§ 2511 ..... *passim*

§ 2518 22

§ 2520 17

§ 3105 13

United States Code, Title 28

§ 1254(1) 2

§ 1291 12

§ 1331 12

§ 1367(a) 12

United States Code, Title 42

§ 1983 18

Sup. Ct. R. 12.5 2

Fed. R. Civ. P. 54 15

STATE

CASES

Oziel v. Superior Court (CBS Inc.), 223 Cal.App.3d 1284 (1990) 23

State v. Bullock, 901 P.2d 61 (Mont. 1995) 23

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Montana Constitution, Art. II, § 10 23

S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112 17



CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioners Paul W. Berger and Erma R. Berger (the "Bergers") respectfully conditionally cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these related cases.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 129 F.3d 505 and entitled *Berger v. Hanlon*. App. 1a. The decisions of the District Court are unreported. App. 27a, 49a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on November 13, 1997, in which it reversed in part and affirmed and remanded in part, the District Court's dismissal of the Bergers' two related civil actions. The Media and Government defendant-appellees filed separate Petitions for Rehearing and Suggestion for Rehearing En Banc which were both denied on February 25, 1998.[1] App. 61a. The Media and Government filed Petitions for Writs of Certiorari which were

[1] The Media cross-respondents are Turner Broadcasting System, Inc. ("Turner"), Cable News Network, Inc. ("CNN"), CNN correspondent Jack Hamann ("Hamann"), Robert Rainey ("Rainey"), and Donald Hooper ("Hooper"). The Government cross-respondents are Assistant United States Attorney Kris

both docketed on May 28, 1998. Justice Sandra Day O'Connor extended the time to file responses to the Petitions until July 27, 1998. This Cross-Petition is pursuant to United States Supreme Court Rule 12.5. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides that,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Electronic Communications Privacy Act of 1986, also known as the Wiretap Act (18 U.S.C. §§ 2510, *et seq.*), is involved in part. Sections 2511(1) and (2) provide, in part, that,

> (1) Except as otherwise specifically provided in this chapter any person who

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McLean ("AUSA McLean"), United States Fish & Wildlife Service ("FWS") Special Agents Rodney C. Hanlon ("Hanlon"), Joel Scrafford ("Scrafford"), Richard C. Branzell ("Branzell"), and Robert Prieksat ("Prieksat").

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication;

* * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b) to (c), 2511(2)(e), 2516,

and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation, shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5)

* * *

(2)(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

STATEMENT OF THE CASE

This Cross-Petition involves a newsgathering subculture formed by an alliance between the Media and the Government who brandish the First and Fourth Amendments as swords, slashing away at individual rights, to jointly create reality-based law enforcement entertainment. The Government wants to publicize its law enforcement efforts and the Media want a sensational story with high ratings and that can deliver a worldwide audience; the Government provides both the storyline, which is usually a criminal investigation, and the stage, which is usually someone's private property. The Government also provides the performers – the individuals under investigation and their innocent family members – who like the Bergers, are exploited as unwitting actors.

This Cross-Petition attacks the Media's use of law enforcement personnel and vehicles to secrete its hidden microphones and cameras, enabling the Media to surreptitiously obtain confidential conversations from private citizens like the Bergers for use as broadcast sound bites. Where, as here, the use of a hidden microphone and camera is not an authorized function of a Government investigation, it is illegal as a matter of law for two reasons. First, a Government Agent is not acting under "color of law" since wearing a hidden microphone for the Media is not a logical or reasonable part of the Agent's job. Second, where the eavesdropping is for the purpose of invading privacy or procuring embarrassing and incriminating statements for broadcast entertainment, the Agent's conduct on behalf of the Media was not by valid consent. Thus, the Media's conduct is an illegal wiretap proscribed by the Wiretap Act.

This Cross-Petition also seeks to establish that the Media may not perpetually broadcast recordings and footage obtained through the Media's violation of the Constitution and laws of the United States and the several states. An injunction in these circumstances is not an unconstitutional prior restraint. After the courts make a final determination that the Media's video and audio recordings were obtained in violation of the Bergers' constitutional or state rights, an injunction would be a lawful suppression of the fruits of the Media's illegal conduct and a constitutional remedy for the wrongs committed. To allow the Media's post-final judgment use of any ill-gotten video or audio recordings would constitute a continuing violation of the Bergers' constitutional rights.

A. Factual Background

In early 1993, the Media contacted Agent Scrafford and initiated negotiations with AUSA McLean on behalf of the Government to join a law enforcement investigation. ER 1:¶¶ 34-36, 37/A; ER 5/1; ER 2:¶1; ER 6:¶¶18-20; ER 5/7:36:5-25.[2] Those efforts resulted in the March 11, 1993 written agreement ("Agreement"), executed between AUSA McLean and CNN's Hamann, under which the Media were given "exclusive access" to the Berger Ranch to use as the backdrop for, and the search as a source of, video and audio recordings ("outtakes") which the Media intended to and did broadcast repeatedly worldwide on their various television outlets. ER

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[2] Citations are to the excerpts of record ("ER") filed by the Bergers in the CNN Appeal No. 96-35266, to the tab number within the ER and the exhibit within the tab.

1/A; ER 2/A; ER 5/1;[3] ER 1:¶¶34-40; ER 3:¶¶1, 18-24, 34-50, 68, 69. The Media, in turn, granted the Government's express desire to publicize its efforts to enforce environmental laws. ER 5/1, 5/2, 5/8:T11:7-8.[4] A *week later*, a United States Magistrate Judge issued the Search and Seizure Warrants but was never advised of the Agreement nor of the Media's intended participation. The Magistrate Judge did not authorize Media cameras and microphones. ER 5/3, 5/4; ER 1:¶¶47-48; ER 3:¶¶25-27. The Search Warrant only authorized a search of "The Paul W. Berger Ranch with appurtenant structures, *excluding the residence*." ER 3:¶28; ER 4:¶7.

By pre-arranged plan, the Media were an integral part of the Government convoy of vehicles when the search of the Berger Ranch commenced before dawn on March 24, 1993. ER 5/8:T6-T7:2.[5] With the Government

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[3] Under the unsigned March 5, 1993 version of the Agreement, the FWS agreed to allow CNN to accompany its Agents in the execution of the search warrant; under the signed March 11, 1993 Agreement, CNN's permission was conferred by the United States Attorney's Office for the District of Montana instead of the FWS.

[4] Mr. Berger was under criminal investigation by AUSA McLean for killing federally-protected eagles as a result of lacing dead livestock carcasses with poison as a means of controlling predatory coyotes. ER 1:¶74; ER 3:¶32; ER 5/8:T11:2-4. References to "T[#]:[page]" refers to the [video]tape number and page(s) of the (incomplete) written transcription of the videotapes made during the Berger search entitled "Ring of Death." ER 5/8.

[5] The Media were also permitted by the Government to participate in and videotape and record the pre-search briefing conducted on or about March 23, 1994. ER 1:¶¶49-52; ER 3:¶¶29-33; ER 5/2, 5/8T1:3-4, T3:1-5, T:1-6. The Media were

Agents' assistance, the Media video and audio taped the convoy both from inside a Government vehicle and mounted one of its cameras on the exterior of another Government vehicle driven by Government Agents. ER 3:¶34; ER 5/8:T6:2-T7:2.

Media cameras were focused on Mr. Berger as he came upon the convoy while driving his pick-up truck down the county road at approximately 6:00 a.m. He stopped and was approached by Government Agents including Agents Scrafford, Branzell and Prieksat. ER 4:¶¶2-35/8:T7:2. Agent Scrafford told Mr. Berger a search warrant was about to be executed at his Ranch and that the Court had *ordered* a search of *every building*; he was *not told that the residence was excluded*. ER 3:¶36; ER 4:¶¶4, 7; ER 5/8:T7:6. Agent Scrafford requested to ride in Mr. Berger's truck back to the Ranch, claiming that he wanted to explain the situation to Mrs. Berger.[6] Mr. Berger drove him as requested. ER 4:¶5; ER 5/8:T7:1-16. Agent Scrafford informed Mr. Berger that he would be imprisoned in Billings if he did not cooperate with the federal authorities. Mr. Berger was shaking and very upset. ER 4:¶17; ER 5/8:102:13-15.[7]

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made privy to confidential information about the Bergers and the criminal investigation against Mr. Berger, including details about the sealed warrants and their execution.

[6] Mrs. Berger was never a suspect or target of the underlying criminal investigation and was never charged with any criminal offense. No formal charges had yet been brought against Mr. Berger at the time of the search. ER 5:¶8; ER 5/3, 5/4.

[7] At the time, Mr. Berger was 71 years old, in poor health and on oxygen and medication, having been in and out of the

Mr. Berger was never informed that Agent Scrafford was the Media's human "boom mike". Agent Scrafford wore a hidden microphone installed by the Media to record secretly everything said solely for the Media's benefit. ER 3:¶37; ER 4:¶¶5-6. Mr. Berger was not advised that the Media were videotaping and recording him, including his interrogation by Agents Scrafford, Branzell and Prieksat, who asked him leading questions about his alleged use of illegal poisons and eagle killing. ER 3:¶¶37, 38, 41-42; ER 4:¶¶5, 8-13; ER 5/8:T7:1-16. Mr. Berger was never advised of any of his rights, such as the right to remain silent. ER 3:¶¶39, 40; ER 4:¶¶9, 14; ER 5/8:T7:1-16.

Although the Berger residence was excluded from the Search Warrant, Agents Scrafford and Branzell entered the Bergers' home and brought the Media microphone inside.[8] Unbeknownst to the Bergers, their conversations were secretly monitored and recorded by the Media through Agent Scrafford's hidden microphone. ER 3:¶48; ER 4:¶¶5, 6, 8, 10-13, 18; ER 5/8:T7:15-16.[9]

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hospital during the previous five months and just released ten days earlier for treatment of pneumonia and high blood pressure. ER 4:¶17.

[8] The Bergers contend that Agent Scrafford neither requested nor received permission from them to enter their residence. ER 3:¶¶45-46; ER 4:¶¶5-6; 5/7:115:7-116:4. The entry was well after Mr. Berger had been informed that every structure on his ranch was covered by the Warrant and that he would be imprisoned if he did not cooperate.

[9] Mrs. Berger was in the house. At the time, she was 81 years old and also recently hospitalized in ill health. ER 4:¶17.

The Government and Media worked jointly to conceal the Media's identity, presence and activities on the Ranch. ER 5/8:T8:13. The Bergers were never advised that the Media had entered the Ranch with the aid of the Government and were conducting a private search by videotaping and recording the search on their land and in the various buildings. ER 4:¶¶5, 6, 8, 10-13, 18; ER 5/8:T8:13. The Bergers believed that the Media were Government Agents as they were all dressed in "street" clothes and were indistinguishable from the law enforcement personnel. ER 4:¶¶11, 12; ER 5/8:T6:3. Even after Mr. Berger discovered the videocamera and protested, Hamann deftly directed the camera elsewhere and Agents Branzell and Scrafford helped to divert Mr. Berger's attention by bombarding him with leading questions. ER 4:¶¶5, 10; ER 8/8:T8:13.

Government Agents helped the Media set up and obtain shots and provoked useful "sound bites" from Mr. Berger throughout the day-long search. ER 5/5, 5/2, 5/8:T11:2-8.[10] Many intrusive outtakes of Mr. Berger's images and statements, interiors of ranch buildings, outdoor locations and scenes of the Agents' search and seizure of "evidence" were incorporated into a Media program entitled "Ring of Death." ER 5/2, 5/8:T(entire). Although Mr. Berger was acquitted by a jury of three felony counts of killing at least one eagle and convicted

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[10] The outtakes included on-camera interviews of Government Agents made at the Berger Ranch. During one lengthy interview, AUSA McLean made personal and disparaging remarks about Mr. Berger.

only of using a pesticide contrary to its labelling, a misdemeanor, Hamann introduced the segment by implying that Mr. Berger had killed hundreds of eagles. The segment was broadcast on CNN and Turner channels nationally and internationally at least ten (10) times through April 1994. ER 5/8T12:1-3; 5/9:4. It may still be on the air somewhere in the world today.

B. Basis for Federal Jurisdiction Below

The Bergers filed two related civil actions against the Media and Government in the United States District Court in Montana under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the federal wiretap act (18 U.S.C. §§ 2510, *et seq.*), state common law (trespass, conversion and intentional infliction of emotional distress) and for declaratory and injunctive relief and monetary damages.[11] The Bergers principally alleged that (1) the Government Agents violated their Fourth Amendment rights by permitting commercial television cameras to film the search and by assisting the Media in their search for dramatic material, and (2) the Media acted sufficiently in concert with the Government to be held accountable for that violation as Government actors. On February 26, 1996, after only nominal discovery was allowed, the District Court entered an order and final judgment granting summary judgment on all counts of the Complaint in favor of the

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[11] The Bergers initially sued CNN and Hamann on March 21, 1994, filed the First Amended Complaint in April 1995 and the Second Amended Complaint ("Complaint") on May 19, 1995 naming all of the Media and Government parties herein.

Media and Government. District Court jurisdiction was pursuant to 28 U.S.C. §§ 1331 and 1367(a).

The Bergers' Notice of Appeal was timely filed on March 5, 1996, conferring jurisdiction on the Court of Appeals under 28 U.S.C. § 1291. As to the questions presented in this Cross-Petition and for the reasons discussed below, the Ninth Circuit held that the Bergers' rights were violated by the Media-Government foray onto their private Ranch. In sum, the Court of Appeals declared:

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose . . . . This search violated [the Fourth Amendment's] protections.

App. 9a-10a.

As to the Government Agents' conduct, the Ninth Circuit reversed the District Court and held that the Agents violated the Bergers' Fourth Amendment privacy rights. App. 10a (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) ("clearly established" test for determining constitutional violation and qualified immunity). The court concluded that the agents were not protected from

suit by qualified immunity because "no reasonable officer could have thought it permissible" to invite the press "into the home of the person searched." App. 11a (citing *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995)); *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995); and 18 U.S.C. § 3105 (which prohibits "any persons, other than law enforcement personnel and those assisting them from executing search warrants"). The Ninth Circuit found further support for this view in observing that,

> no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant.

App. 11a-12a.

As to the Media, the Ninth Circuit also reversed the District Court and held that the Media's conduct with the Government amounted to state action for purposes of constitutional liability. App. 19a. Under the "joint action" test, the Ninth Circuit stated that it is satisfied and the United States "Supreme Court has said is satisfied when the plaintiff is able to establish an agreement, or conspiracy between a Government actor and a private party [citation omitted.]" App. 18a; *see Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983); *Ginn v. Matthews*, 533 F.2d 477 (9th Cir. 1976). The Court of Appeals noted that,

> [i]n this case we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the

> government could lawfully institute – the execution of a search warrant – for the mutual benefit of both the private interests of the media and the government officials' interest in publicity. It is also alleged that the federal entities shared confidential information with the media. Indeed, the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators, rather than to further their investigation. This satisfies the joint action test.

App. 19a.

The Ninth Circuit also declared that the Media were not mere "passive observers" as they prefer to characterize themselves. The Court of Appeals observed that the press in the older, lower court decisions relied on by the Media were different from the "active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." App. 13a. "In none of these cases did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the Media that occurred in this case." App. 12a.

The Ninth Circuit further held that the Media's use of the hidden microphone was unlawful eavesdropping and violated the Bergers' privacy "because the surreptitious recording was not done for a legitimate law enforcement purpose." App. 15a. In rejecting the Media's reliance on

the "invited informer" doctrine, the court held that the doctrine does not shield the press where, as here, "law enforcement authority was used to assist commercial television, not to further law enforcement objectives." App. 16a. The court noted that the Media acknowledged that the Berger residence was outside the scope of the warrant and that the Bergers did not consent to the microphone's entry into the home. App. 14a. In support of its ruling the court cited *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), to reiterate that

> [w]e recognized this more than twenty years ago when we held that eavesdropping by the media for public broadcast, even in conjunction with law enforcement, violates important privacy interests.

App. 16a.

Ironically, while concluding that the Media's eavesdropping was "not done for a legitimate law enforcement purpose," the Ninth Circuit, like the District Court, disregarded the legitimate law enforcement purpose requirement of the "color of law" element of the Wiretap Act and held that the Media's eavesdropping was not unlawful under that act. This conclusion is illogical and in conflict with the Seventh Circuit's reasoned analyses of the exceptions to the Wiretap Act in *Thomas v. Pearl*, 998 F.2d 447 (7th Cir. 1993).

The Ninth Circuit also affirmed dismissal of the Bergers' injunction cause of action as a prior restraint. App. 25a. In this regard, the Bergers' complaint alleged two conjunctive causes of action, for declaratory relief and injunction. Federal Rule of Civil Procedure 54. What

the Bergers seek is a declaration that the Media's method of obtaining their images and recordings was unlawful, indeed unconstitutional; once determined, the Bergers would then ask that the Media be enjoined from the perpetual future use of the images and recordings which were unlawfully obtained. The Bergers submit that enjoining the use of the fruits of unlawfully obtained and confidential information is not an unconstitutional prior restraint.

REASONS WHY THE WRIT SHOULD BE GRANTED

This Cross-Petition should be granted because the Ninth Circuit's opinion on the issue of "color of law" under the Wiretap Act decided an important question of federal law, in conflict with the Seventh Circuit in *Thomas*, that has not been, but should be, settled by this Court. This Cross-Petition should also be granted because the Ninth Circuit's opinion on the issue of an injunction as a prior restraint raises an important and unsettled question of federal law regarding the Media's attempt to benefit from the disclosure and use of unlawfully acquired information that has not been, but should be, settled by this Court.

I. THE MEDIA VIOLATED THE WIRETAP ACT WHEN THEY ENTERED THE BERGERS' PRIVATE RANCH AND RESIDENCE BY INSTALLING A HIDDEN MICROPHONE ON A GOVERNMENT AGENT TO SURREPTITIOUSLY RECORD PRIVATE CONVERSATIONS

The Wiretap Act was enacted in 1968 and amended in 1986 to prohibit all interceptions of wire and oral communications except as expressly authorized in the statutes.

18 U.S.C. §§ 2510-2520. The Ninth Circuit violated the spirit and intent of the Wiretap Act when it ruled that the Media unlawfully eavesdropped on the Bergers, but turned a blind eye and excused the Media under the Wiretap Act. According to Congress' articulated purpose for the Wiretap Act, the Media's eavesdropping venture with the Government was unlawful:

> Title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order. . . .

S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153.

To approve the Ninth Circuit's holding on the wiretap issue would defy Congress' intent that the protection of privacy under the Wiretap Act be more extensive than the Fourth Amendment constitutional standards set forth by this Court in *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). *Id.* Indeed, to condone the Ninth Circuit's holding would defy this Court's own view that,

> [u]nauthorized interceptions and the disclosure and use of information obtained through the unauthorized interception are crimes . . . and the victim of such interception, disclosure or use is entitled to recover civil damages.

Gelbard v. United States, 408 U.S. 41, 46 (1972); *see* 18 U.S.C. § 2520 (disclosure and use of the contents of intercepted communications subject to same sanctions as interception itself).

Here, the Ninth Circuit ruled that the Media's use of a hidden microphone was invasive eavesdropping and

not protected by the Media's defensive use of the "invited informer" doctrine. App. 15a. Yet, disregarding its well-reasoned analysis on that issue, the Ninth Circuit inconsistently ruled that both the Media and Government "were acting under the authority of a search warrant" for purposes of the liability exception to the Wiretap Act. App. 22a. The court determined that because Agent Scrafford consented to wear the Media microphone when he induced the Bergers to converse, it was sufficient to apply the one consent exception of Section 2511(2)(c). *Id.* The District Court had decided the issue on other grounds, the second exception to liability, Section 2511(2)(d). The District Court held that the Media's conduct was not under "color of law" but was shielded by the consent of a federal agent. The District Court also erroneously held that wiretaps for commercial purposes are neither criminal nor tortious. App. 41a-42a. Both decisions below were incorrect determinations of an important question of federal law.

A. Agent Scrafford was acting as a human "boom mike" for the Media and not an Agent authorized under "color of law"

The Government did not obtain the required court order to wiretap the Bergers for law enforcement purposes and, thus, Agent Scrafford was not acting under "color of law" when he donned the Media's hidden microphone. The Ninth Circuit acknowledged that the scope of the "color of law" requirement under Section 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983) and *Bivens* is different than the scope of the "color of law" requirement for the Wiretap Act. App. 21a. Although the

Ninth Circuit cited *Thomas*, 998 F.2d at 450-51, it disregarded the Seventh Circuit's careful analysis of the narrow reading of "color of law" under the Wiretap Act.

As the *Thomas* court observed, the Civil Rights Act, unlike the Wiretap Act, is a remedial statute intended to be as broad as the Fourteenth Amendment, under which "the Supreme Court has narrowed (if not completely eliminated) the immunity enjoyed by Government officials in favor of individuals who have been allegedly harmed by the state." *Id.* at 451. As to the Wiretap Act, the *Thomas* court added,

> [c]ontrast this with the wiretapping act where color of law is used not to create a cause of action for injured plaintiffs but to exempt certain state officials from liability for their behavior. In this context, the broadest reading of color of law would hinder, rather than further the essential purpose of the act: to protect individuals from invasions of privacy.

Id. As the Seventh Circuit in *Thomas* made clear, for a wiretap to be under "color of law" for purposes of § 2511,

> there must be some logical and reasonable connection between the government worker's job description and eavesdropping.

Id.

There was no logical and reasonable connection found in *Thomas*, when Pearl, a basketball coach at a state university, was sued by Thomas for violating the Wiretap Act when he surreptitiously tape recorded their telephone conversations while attempting to recruit Thomas. *Id.* at 449. The District Court had ruled that Pearl did not

violate the Wiretap Act under § 2511(2)(c) because he acted under "color of law" as a state employee and was a party who consented to the conversation. *Id.* at 449-50. The Seventh Circuit agreed that Pearl did not violate the Wiretap Act but for a different reason. *Id.* at 451.

While stating that as a state employee, Pearl would have been acting under "color of law" if Thomas sued him for civil rights violations under § 1983 (*Id.* at 450), the Seventh Circuit held that Pearl was *not* acting under "color of law" under the Wiretap Act because there was no logical and reasonable connection between Pearl's job and the eavesdropping. The court noted that "[w]e do not expect college administrators and athletic directors to wiretap, or sanction wiretaps, any more than basketball coaches." *Id.* at 451. Thus, the exception of § 2511(2)(c) did not apply. However, the Seventh Circuit also held that the second exception under § 2511(2)(d) did apply, in which an unlawful wiretap would not be excused if done for the purpose of committing a crime or tort, because Thomas did not allege any tort other than a wiretap violation alone. *Id.* In contrast, the Bergers separately allege that the wiretap was done for the purpose of committing criminal or tortious acts. *See Thomas*, 998 F.2d at 451; *Desnick v. American Broadcasting Co., Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995).

As though anticipating that another court might apply an inappropriately broad reading of "color of law" in the wiretap context, the *Thomas* court issued the following admonition:

> [a]lso, if "color of law" means the same thing in § 2511 that it means in § 1983, police officers

> who secretly taped conversations without a warrant or the approval of their superiors would be free from criminal and civil liability. That cannot be what Congress intended.

Id. That is what occurred here.

B. The Media's recording was not for any legitimate law enforcement purpose but to criminally and tortiously violate the Bergers' rights

The Media's recording of the conversations of Mr. and Mrs. Berger with the federal Agents was not made to meet the legitimate needs of law enforcement, but in order to criminally and tortiously violate their rights.

It was Congress' intent from the time the § 2511 exceptions were added that their purpose was only to protect the "legitimate needs of law enforcement" and to "allow private persons to use the technique for lawful purposes." 114 Cong. Rec. 14720-21 (1968) (Justice Department comments).[12]

Contrary to the Ninth Circuit's ruling, the facts show that the Government and Media were not acting under "color of law." The Media's wiretap was not for any legitimate law enforcement purpose, or lawful purpose,

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[12] According to the Department of Justice, "[t]he present amendment is designed to prohibit the flagrant abuses that exist with respect to the practices of consensual wire tapping and eavesdropping, so at the same time to allow private persons to use the technique for lawful purposes. *The amendment places no restrictions on law enforcement officers acting in the ordinary course of their duties. . . .*" *Id.*

and was not logically and reasonably related to Agent Scrafford's job. The Ninth Circuit held that the "surreptitious recording was not done for a legitimate law enforcement purpose." App. 15a.

The Government neither applied for nor obtained court authority to wiretap the Bergers even though it obtained the Search and Seizure Warrants because it knew or should have known that the Media's wiretap was illegal. 18 U.S.C. § 2518 (request for authority to obtain wiretap, like search warrant, must be in writing). The Media even conceded that the Berger residence was outside the scope of the warrant and that the Bergers did not consent to the microphone's entry into the home. App. 14a.

Agent Scrafford was simply a piece of recording equipment, a human "boom mike", who wore the Media's microphone and allowed the Media to obtain the Bergers' confidential statements. There was no logical and reasonable connection to Agent Scrafford's job, lawfully executing the Search Warrant. The Ninth Circuit even ruled that "law enforcement authority was used to assist commercial television, not to further law enforcement objectives." App. 16a. Any "consent" by Agent Scrafford or any other Agents was vitiated by their illegal presence in the Berger residence and failure to obtain a warrant for the wiretap. There is simply no logical or reasonable connection between the facts presented and the Ninth Circuit's decision. A direct conflict is created with the "color of law" analysis set forth in *Thomas*.

The Media are not protected by the second exception to liability under § 2511(2)(d). Here, the Media's eavesdropping was done "for the purpose of committing a criminal or tortious act in violation of the Constitution or laws of the United States or of any state" as the Ninth Circuit held. 18 U.S.C. § 2511(2)(d). Section 2511(2)(d) provides no defense.

Each broadcast of illegally obtained video and audio recordings constitutes a new, separate invasion of the Bergers' privacy, infliction of emotional distress, and a further violation of their Fourth Amendment rights. The Sixth Circuit considered this issue in *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991), in noting that what is implicit under the Wiretap Act is that what is not expressly permitted is forbidden and,

> [i]t seems beyond doubt that the release of *unlawfully* obtained wiretap material to any third party under the circumstances presented by this case is clearly banned by the Act.

(emphasis added) *Id.* at 401-402; *see Oziel v. Superior Court (CBS Inc.)*, 223 Cal.App.3d 1284, 1302 (1990) (each viewing of videotape of execution of search warrant constitutes a separate illegal search); *see also* Montana Constitution, Art. II, § 10; *State v. Bullock*, 901 P.2d 61 (Mont. 1995) (Montana's constitutional right of privacy is even broader than under the Federal Constitution).

The Bergers should not suffer the consequences of the Media's unlawful wiretap. While a person who allows another into his home or office takes the risk that the visitor may not be what he seems,

> he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modem world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. A different rule could have a most pernicious effect upon the dignity of man.

App. 16a-17a (quoting *Dietemann*, 449 F.2d at 249).

II. THE MEDIA SHOULD NOT BENEFIT IN PERPETUITY FROM THE FRUITS OF NEWSGATHERING PRACTICES THAT VIOLATE THE CONSTITUTION

The Ninth Circuit erroneously concluded that even though the Media's joint venture with the Government violated the Bergers' constitutional rights and resulted in triable claims for damages, an injunction to prevent perpetual victimization is prohibited by the Constitution. App. 25a. The Bergers submit that an injunction against further broadcast or sale of the video and audio recordings of the search would not violate the Constitution's prohibition on prior restraint because the Media would have been afforded a full and fair opportunity to litigate the legitimacy of its conduct. Following a final judgment that the Media's method of obtaining the video and audio recordings of the Berger search violates the Constitution, there should be no bar to prevention of publication.

In refusing to authorize an eventual prohibition of the Media from using the fruits of its unlawful newsgathering, the Ninth Circuit raises an important question of federal law which is ripe for this Court to decide.

Previously and in other contexts, this Court has expressly reserved the question whether the Government, in cases where information has been acquired unlawfully by a newspaper or by a source, may ever punish not only the unlawful acquisition, but the ensuing publication as well. *Florida Star v. B.J.F.*, 491 U.S. 524, 533-36 (1989).

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973), Justice Powell stated: "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." As in *Pittsburgh Press*, the Berger's request for an injunction would not endanger arguably protected speech; "[b]ecause the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication." *Id.* Here, the Bergers would seek a final determination of the unlawfulness of the Media's newsgathering practices. An injunction after this determination is appropriate.

The doctrine of prior restraint on the press is derived from the "dominant purpose of the First Amendment . . . [to foster] [o]pen debate and discussion of public issues. . . . " *New York Times Co. v. United States*, 403 U.S. 713, 723-724 (1971). The purpose is not to reward criminal, tortious and unconstitutional conduct. Denial of the Bergers' injunction request permits the Media to be free to cause or threaten further emotional harm to the Bergers at any time in the future, even after a final judgment defining the illegality of their conduct. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (injunction

warranted where proof shows sufficient likelihood of irreparable injury); *Galella v. Onassis*, 487 F.2d 986, 994-995 (2d Cir. 1973) (defendant photographer enjoined from taking any action that would harass, alarm or frighten Mrs. Onassis or her children).

The violation of the Fourth Amendment empowers the courts to enjoin further action by the Media. Justice Harlan's concurrence in *Bivens*, the basis for the Bergers' suit, noted that a court's power to enjoin invasions of constitutionally protected interests derives directly from the Constitution. *Bivens*, 403 U.S. at 404 n.5. In Harlan's words, the judiciary "has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. . . . " *Id.* at 407.

CONCLUSION

When the Media execute a written contract with the Government, trespass on private property, use Government Agents to perform and stage video and audio recordings of the search of private property, and install a hidden microphone on a Government Agent to surreptitiously obtain private sound bites inside a private home excluded from the search warrant, the Media are engaged in illegal wiretapping. The repeated broadcast of the proceeds of this unconstitutional and illegal conduct is appropriate to be enjoined. The Ninth Circuit decided important questions of law that have not been, but now should be, settled by this Court.

For the reasons set forth in this Cross-Petition, the Bergers respectfully request that if the Media's Petition for Writ of Certiorari is granted, that this Cross-Petition be granted as well.

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No. 98-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PAUL W. BERGER and ERMA R. BERGER,
Cross-Petitioners,

v.

CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER, JACK HAMANN, RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,
Cross-Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION OF FEDERAL OFFICERS TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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13 pp

QUESTIONS PRESENTED

1. Do the media violate the Electronic Communications Privacy Act of 1986 (the Wiretap Act) by surreptitiously recording conversations through a hidden microphone worn by a law enforcement agent who enters a private residence beyond the scope of the search warrant's authority?

2. Are the media entitled to perpetually republish or sell video and audio recordings, or is an injunction appropriate, where there is a final judicial determination that the media unlawfully obtained the video and audio recordings in violation of the Constitution or laws of the United States or any state?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

CONCLUSION 9

TABLE OF AUTHORITIES

PAGE

Cases

Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995) 3, 9
Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *cert. pending in* Case No. 97-1927 9
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 3
CBS, Inc. v. Davis, 510 U.S. 1315 (1994) (Blackmun, Cir. J.) 5
City of Los Angeles v. Lyons, 461 U.S. 95 (1982) 6
Elder v. Holloway, 510 U.S. 510, 514 (1994) 9
Florida Star v. B.J.F., 491 U.S. 524 (1989) 6
Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) 5
Hanlon v. Berger, Case No. 97-1927 . . . . . 2, 4, 8, 9
New York Times Co. v. United States, 403 U.S. 713 (1971) 6
Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997) 9
Pittsburgh Press v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) 6
Scheuer v. Rhodes, 416 U.S. 232, 240 (1974) 9
Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993) 7, 8
Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998) (en banc), *cert. pending in* Case No. 98-83 9

Constitutional Provisions, Statutes, and Regulations

U.S. CONST. amend. I . . . . . *passim*
U.S. CONST. amend. IV . . . . . *passim*
Federal Wiretap Act, 18 U.S.C. §§ 2510 *et seq.* 4, 6, 7
7 U.S.C. § 136j(a)(2)(G) 2
18 U.S.C. § 2511(2)(d) 6
18 U.S.C. § 2511(2)(c) 6

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OPPOSITION OF FEDERAL OFFICERS TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case -- which remains in its preliminary stages and has not yet gone to trial -- has spawned two separate petitions for *certiorari* and now a conditional cross-petition for *certiorari*. In fact, the federal officers have raised the only clean legal issue that is appropriate for resolution at this early stage of the litigation: the validity of the qualified immunity defense they have raised as a bar to the *Bivens* claims asserted against them.

All other issues, including those raised in the conditional cross-petition, are premature, insubstantial, or otherwise not worthy of plenary review by the Court at this time.

COUNTERSTATEMENT OF THE CASE

This lawsuit stems from an investigation by the United States Fish and Wildlife Service in the Department of the Interior. It resulted in the conviction of Mr. Berger for using a registered pesticide (Furadan) in a manner inconsistent with its labeling, under 7 U.S.C. § 136j(a)(2)(G). Pet. App. 7a.[1]

The federal officers in this case are four special agents of the United States Fish and Wildlife Service in the Department of the Interior and an Assistant United States Attorney who helped plan and participated in the investigation. To obtain evidence concerning allegations that Mr. Berger had killed numerous eagles on his ranch, they sought a warrant to search the ranch. The reasonableness and validity of that warrant is not in question here. The officers also agreed to allow employees of Turner Broadcasting System (TBS) and Cable News Network (CNN) to accompany them and report on the conduct of their investigation. The Government's objective was "to publicize its efforts to combat environmental crime." Pet. App. 4a. The video footage was placed under embargo until any resulting criminal proceedings had effectively concluded. *Id.* at 4a-5a.

On the morning of March 24, 1993, the team of federal officers, accompanied by a CNN media crew, proceeded to the Bergers' ranch and properly executed the search warrant. Their actions were audiotaped and videotaped by the media crew at all times. The media crew, however, did not actively participate with the officers in a search for evidence. Pet. App. 36a. In the subsequent prosecution of Mr. Berger, he filed a motion to suppress this evidence at his trial, contending that the warrant was defective and the officers lacked probable cause to

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[1] The citations referenced as "Pet. App." are from the decisions below in this case as set forth in the appendix that was filed with the petition for *certiorari* in *Hanlon v. Berger*, Case No. 97-1927, which is currently pending before the Court.

undertake the search. The motion to suppress evidence was denied. *Id.* at 7a.

The Bergers sued the federal officers and the media under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), alleging the violation of their constitutional rights. They also brought other federal and state law claims against the media, including a claim for injunctive relief. The principal contentions under *Bivens* were that the federal officers violated the Fourth Amendment by permitting the media crew to film their execution of the search warrant, and that the media acted sufficiently in concert with the officers to be treated as government actors in this lawsuit. Pet. App. 2a. The federal officers moved to dismiss the *Bivens* claim, or in the alternative for summary judgment, based on their defense of qualified immunity.

The District Court treated the motion as one for summary judgment, denied the request for injunction, and dismissed the claim raised under the Federal Wiretap Act. It also upheld the federal officers' defense of qualified immunity, holding that the constitutional rights alleged by the Bergers were not "clearly established" in March of 1993. Pet. App. 34a. Indeed, the court noted that such law as existed at that time had tended to uphold the constitutionality of the officers' conduct. The court also held that the media had not become government actors for purposes of *Bivens* liability. *Id.* at 39a-40a.

On the latter points, the Ninth Circuit reversed. On the issue of qualified immunity, in particular, the court cited with approval the Second Circuit's decision in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), which "held that even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible." Pet. App. 11a. It briefly, and unconvincingly, sought to distinguish the contrary holdings on qualified immunity reached by the Eighth and Fourth Circuits. *Id.* at 12a. The court affirmed the trial court's rulings on the request for an injunction and on the wiretap claim, and the case was thereupon remanded for trial.

REASONS FOR DENYING THE WRIT

The conditional cross-petition raises issues that are premature, insubstantial, or otherwise not certworthy at this time. For these reasons, the Court should limit its grant of *certiorari* in these related cases to the cleanly presented questions presented in *Hanlon v. Berger*, Case No. 97-1927, which concern whether the federal defendants are entitled to prevail on their defense of qualified immunity and be dismissed from this litigation. Those issues are timely and important, and would allow the Court to resolve a direct conflict among the circuit courts of appeals, in contrast to the more pedestrian issues raised conditionally in this petition.

The cross-petition claims that the courts below erred in two respects: both allegedly erred in denying plaintiffs' request for an injunction, noting that the request sought a prior restraint, which is routinely held to be impermissible under the First Amendment, *see* Pet. App. 25a-26a; *see id.* at 42a; and both allegedly erred in dismissing plaintiffs' claims brought under the Federal Wiretap Act, 18 U.S.C. §§ 2510 *et seq.*, for various reasons, including that a party to the conversations consented to their interception, *see* Pet. App. 22a; *see id.* at 42a. On each point, the rulings below were correct and do not warrant review.

To begin with, even on the cross-petitioners' own terms, the issue that they raise concerning their motion for injunction is premature at this time. They acknowledge, for example, that any injunction that they could obtain should only issue "[f]ollowing a final judgment that the Media's method of obtaining the video and audio recordings of the Berger search violates the Constitution." Cr.-Pet. 24. This case, however, is as yet only in its preliminary stages, in which pretrial motions are being resolved. The cross-petitioners later reframe the issue in the same revealing vein: "Here, the Bergers would seek a final determination of the unlawfulness of the Media's newsgathering practices. An injunction *after* this determination is appropriate." *Id.* at 25 (emphasis added).

Obviously, at this point in the litigation, plaintiffs have sought an injunction *before* undertaking to prove their claims at

trial. If the facts they allege are eventually established, they could renew their motion for injunction at that time. At that juncture, they would still face an insuperable hurdle in showing that the outcome they seek is not an impermissible prior restraint, but in any event they cannot demonstrate their entitlement to such extraordinary relief at this point.

Moreover, plaintiffs demand relief here that would impose a classic prior restraint on publication. Under this Court's cases, it is manifest that such relief is rare at best and perhaps may never be permitted under the First Amendment. Indeed, the cross-petitioners do not even see fit to cite or discuss the ruling in *CBS, Inc. v. Davis*, 510 U.S. 1315 (1994) (Blackmun, Circuit Justice, staying preliminary injunction), which was heavily relied on by both courts below and is directly instructive here. In that situation, CBS was investigating unsanitary practices in the meat packing industry, and obtained a videotape furnished by a company employee detailing actions that took place in the company's meat packing facility. The company sought to bar CBS from broadcasting the videotape, contending that the information on the tape was obtained unlawfully under state law. *See id.* at 1316-17. The Court, through Justice Blackmun, concluded that the injunction, if issued, would constitute a prior restraint, and "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Id.* at 1317. This "most extraordinary remedy" is acceptable only in exceptional cases where any harm in the dissemination of the speech is both great and certain and cannot be mitigated by less intrusive measures, which was a far cry from the circumstances at stake in the case against CBS. *Id.*

The cross-petitioners do not even allege that there is any conflict among the circuits on this issue.[2] Instead, they contend

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[2] The cross-petitioners do mention *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), a case enjoining the paparazzi from harassing Jacqueline Onassis and her children. Even in *Galella*, however, the court did not impose any prior restraint on publication or even photographing of the family, but simply imposed more traditional time, place, and manner restrictions. *Id.* at 991-992.

that the ruling below is inconsistent with a few of this Court's decisions -- decisions that have little or nothing to do with the actual situation presented in this case. In *New York Times Co. v. United States*, 403 U.S. 713 (1971), for example, the Court *refused* to enjoin publication of the Pentagon Papers, despite the Government's claim that its publication would create imminent danger to the national security. *Id.* at 714. The case of *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), is plainly inapposite, as it involved mere commercial speech, which is not afforded the same liberty from government regulation. The case of *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), which the cross-petitioners portray as leaving an important open question about the imposition of prior restraints, actually involved only damage claims. The case of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1982), involved an injunction against the use of chokeholds by police officers.

Any suggestion that these cases have any meaningful bearing on the First Amendment issue presented in the cross-petition here is facetious. The core doctrine of deep hostility to prior restraints is one of the more settled areas of free speech law, and it does not warrant further review in this case.

The other issue raised in the conditional cross-petition -- plaintiffs' claim that the Federal Wiretap Act was violated in the circumstances of this case -- fares no better. The District Court ruled that this claim was defeated by the exception contained in the statute for the interception of conversations where one party to the conversation has given consent and the purpose for the interception is not to commit a crime or tortious act. *See* Pet. App. 41a-42a (citing 18 U.S.C. § 2511(2)(d)). Without addressing this point, the Ninth Circuit held that this claim was defeated by yet another exception contained in the statute for the interception of conversations by persons acting under color of law where one party to the conversation has given consent. *See* Pet. App. 21a-22a (citing 18 U.S.C. § 2511(2)(c)).

Both of these alternative grounds are sound, and each provides sufficient support for the lower courts' disposition of this claim. The District Court, granting summary judgment on

this claim, held that the interception in this case was not made for the purpose of committing a crime or tortious act, but instead "for the purpose of producing a news story and for the defendants' commercial gain." Pet. App. 41a. Even if, in the end, the trial court were ultimately to rule that a tort had been committed in the circumstances of this case, and damages were to be assessed under state law, that was clearly not the "purpose" of the interception, which is the legal insulation that the statute enacted by Congress provides against subjecting individuals to absolute liability under federal law any time that they are adjudged to be tortfeasors under state law. None of the discussion of this point presented by the cross-petitioners would justify reading the Federal Wiretap Act so broadly as to make liability under its more limited provisions coterminous with all of state tort law.

Moreover, the reading that the Ninth Circuit gave to the "under color of law" language of the other exception to the federal statute is unexceptional and unworthy of review by this Court. The court below held that this language has as its core aim to shield from liability "those acting under law enforcement authority," and since the actions taken in this case were undertaken under the authority of a search warrant, the statutory exception would apply to prevent liability under federal law. Pet. App. 22a. This approach again is sensible in reading the federal statute as not designed to incorporate all potential liability under state law. Whether or not the media defendants in this case violated state tort law, and should be held liable in damages on that basis, is simply a different question from whether they should be held liable under the more limited provisions of the Federal Wiretap Act. The central flaw in the cross-petitioners' argument is their failure to acknowledge this obvious fact.

The cross-petitioners do profess to find a conflict in the circuits on the "under color of law" issue -- which, again, is at most an alternative ground for the disposition reached by the trial court and affirmed by the court below -- but that alleged conflict does not withstand analysis. In *Thomas v. Pearl*, 998 F.2d 447 (7th Cir. 1993), a basketball player sued a basketball

coach for having surreptitiously recorded their telephone conversations as he sought to recruit the player. The Seventh Circuit held that these actions were not covered by the "under color of law" exemption in the Federal Wiretap Act because they did not involve "law enforcement officers acting within the scope of their authority." *Id.* at 451. Indeed, the Seventh Circuit did not even draw the scope of this exemption quite so narrowly, going on to explain that there must simply be "some logical and reasonable connection between the government worker's job description and eavesdropping." *Id.* This analysis of the federal statute is completely consistent with the approach taken by the court below in this case, which held that the "under color of law" exemption operates "to exempt those acting under law enforcement authority," and since "both the federal appellees and the media appellees were acting under authority of a search warrant, the exception applies." Pet. App. 22a (agreeing with and distinguishing *Thomas*).[3]

Other than their baseless assertion of a conflict between *Thomas* and the decision below, the cross-petitioners do not present any persuasive grounds for the Court to grant plenary review on the federal wiretap issue.

In contrast with the foregoing discussion, the qualified immunity issues presented in *Hanlon v. Berger*, Case No. 97-1927, do merit review at this juncture. The question of whether law enforcement officers violate clearly established law under the Fourth Amendment when they allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant, thus forfeiting their qualified immunity from suit, is fully ripe. This question has spawned a direct conflict between the Second and Ninth Circuits, on the

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[3] In addition, the ultimate holding in *Thomas* was that the coach *was* exempt from liability under the federal statute, because he did not intend to commit a tort against the player -- a conclusion that echoes and accords with the conclusion reached by the District Court in this case, and which is necessary in order to prevent the federal statutory liability from swallowing and overlapping all of state tort law. *See* Pet. App. 41a-42a.

one hand, and the Fourth and Eighth Circuits, on the other. *Compare Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994) (denying qualified immunity), *cert. denied*, 514 U.S. 1062 (1995), *and Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997) (denying qualified immunity), *cert. pending in* Case No. 97-1927, *with Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996) (granting qualified immunity), *cert. denied*, 117 S. Ct. 1081 (1997), *and Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998) (en banc) (granting qualified immunity), *cert. pending in* Case No. 98-83. The issues raised are important both in terms of the public's access to the information necessary to understand and supervise law enforcement officers and in terms of the officers' ability to perform their duties with "the decisiveness and the judgment required by the public good," *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), without being too freely subjected to "potentially disabling threats of liability," *Elder v. Holloway*, 510 U.S. 510, 514 (1994). *Those* issues, not the tangential and uncertworthy issues raised in this conditional cross-petition, are worthy of the Court's full consideration and resolution at this time.

CONCLUSION

The conditional cross-petition should be denied, and the qualified immunity issues presented in *Hanlon v. Berger*, Case No. 97-1927, should be granted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

PAUL W. BERGER and ERMA R. BERGER,
Cross-Petitioners,
v.
CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER, and JACK HAMANN,
Cross-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do members of the news media violate the Electronic Communications Privacy Act (18 U.S.C. § 2510, *et seq.*) when, as part of their news coverage of a law enforcement action, they record conversations of a law enforcement agent, with the agent's consent?

2. Must an appeals court issue an injunction restraining members of the news media from future telecasts of news footage based solely on unproven allegations that the footage was improperly obtained, where there has been no final judicial determination as to the propriety of the newsgathering, no allegation that the footage itself may appropriately be enjoined, and no factual showing that other, less intrusive remedies are inadequate?

RULE 29.6 LISTING

Time Warner, Inc. is the parent company of Cross-Respondent Turner Broadcasting System, Inc. ("TBS") which, in turn, is the parent company of Cross-Respondent Cable News Network, Inc. ("CNN"). Neither TBS nor CNN has any nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 LISTING	ii
TABLE OF AUTHORITIES	v
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
A. Factual Background	3
B. Proceedings Below	8
REASONS THE WRIT SHOULD BE DENIED	11
I. THE HOLDING THAT CNN DID NOT VIOLATE THE WIRETAP ACT WAS CORRECT, DOES NOT CONFLICT WITH ANY OTHER DECISION, AND CAN BE UPHELD ON GROUNDS INDEPENDENT FROM THOSE UPON WHICH THE NINTH CIRCUIT RELIED	12
A. Review by This Court Is Unnecessary Because the Wiretap Act Expressly Permits Journalists To Record Conversations for Newsgathering Purposes	13
B. If, as the Ninth Circuit Found, CNN Acted Under Color of Law for *Bivens* Purposes Based on CNN's Alleged Association With Law Enforcement Agents, then 18 U.S.C. § 2511(2)(c) Applies and Expressly Exempts CNN from Wiretap Act Liability	19
II. REVIEW OF THE NINTH CIRCUIT'S REFUSAL TO ISSUE A PRIOR RESTRAINT IS NOT WARRANTED	23

TABLE OF CONTENTS—Continued

Page

A. This Case Does Not Raise the Question Presented in the Cross-Petition as There Has Been No "Final Judicial Determination" That CNN Did Anything Unlawful 23

B. The Denial of the Bergers' Requested Prior Restraint of News Footage Follows From an Unbroken Line of Authority From This Court 24

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Page

Bailey v. United States, 516 U.S. 137 (1995) 17
Benford v. American Broad. Co., 502 F. Supp. 1159 (D. Md. 1980), *aff'd*, 661 F.2d 917 (4th Cir. 1981) 18
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) ....*passim*
Boddie v. American Broad. Co., 731 F.2d 333 (6th Cir. 1984) 18
Butz v. Economou, 438 U.S. 478 (1978) 8
CBS, Inc. v. Davis, 510 U.S. 1315 (Blackmun, Circuit Justice 1994) .....*passim*
City of Los Angeles v. Lyons, 461 U.S. 95 (1983) .. 28
Desnick v. American Broad. Co., 44 F.3d 1345 (7th Cir. 1995) 15, 16
Deteresa v. American Broad. Co., 121 F.3d 460 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1840 (May 26, 1998) 15
Georgia Soc'y of Plastic Surgeons v. Anderson, 363 S.E.2d 140 (Ga. 1987) 27
Goldblum v. National Broad. Co., 584 F.2d 904 (9th Cir. 1978) 27
Harte-Hankes Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) 16
In re King World Prods., 898 F.2d 56 (6th Cir. 1990) 26
Lothschuetz v. Carpenter, 898 F.2d 1200 (6th Cir. 1990) 27
Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982) 9
Matter of Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986) 25, 26
Monroe v. Pape, 365 U.S. 167 (1961) 22
Near v. Minnesota, 283 U.S. 697 (1931) 26, 27
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 12, 24, 26
New York Times Co. v. United States, 403 U.S. 713 (1971) 11, 24, 26
Omron Atl. Corp. v. Barr, 990 F.2d 861 (6th Cir. 1993) 20, 22
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 2, 23

TABLE OF AUTHORITIES—Continued

Page

Russell v. American Broad. Co., 23 Med. L. Rptr. 2428 (N.D. Ill. 1995) 14, 15, 16
Smith v. Phillips, 455 U.S. 209 (1982) 13
Sussman v. American Broad. Co., 971 F. Supp. 432 (C.D. Cal. 1997) 15
Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994) 14, 20, 21, 22
Wilson v. Layne, 141 F.3d 111 (4th Cir. April 8, 1998) 17

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I 1, 2
7 U.S.C. § 136j (a) (2) (G) 7
18 U.S.C. § 2120 9
18 U.S.C. § 2511 ..... *passim*
18 U.S.C. § 2511 (2) (c) ..... *passim*
18 U.S.C. § 2511 (2) (d) ..... *passim*
42 U.S.C. § 1983 ..... 8, 10

MISCELLANEOUS

4 William Blackstone, *Commentaries* *151, 152 27
Robert L. Stern et al., *Supreme Court Practice* 373 (7th ed. 1993) 13
S. Rep. No. 99-541, 99th Cong., 2d Sess. 17, *reprinted in* 1986 U.S.C.C.A.N. 3555 ..... 3, 18

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Cross-Respondents Cable News Network, Inc., Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann (collectively, "CNN") respectfully request that this Court deny the conditional Cross-Petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED *

In addition to the Constitutional Provisions and Statutes Involved cited by the Bergers, Cross-Pet. at 2-4. The Cross-Petition also involves the First Amendment to the Constitution of the United States, which provides as follows:

* As originally served, the Cross-Petition misquotes 18 U.S.C. § 2511(2)(d). Cross-Pet. at 4. Just prior to filing this Brief in Opposition, CNN received notice that the Bergers have filed a revision with the Clerk correcting this error.

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. Const. amend. I.

STATEMENT OF THE CASE

The issues raised in the Bergers' Cross-Petition do not merit review by this Court. First, the Cross-Petition presents no valid grounds for undermining the well-established principle that the Wiretap Act expressly permits the recording of a conversation where one party consents. This Court's review is unnecessary: The Bergers complain that the Ninth Circuit erred in applying the Wiretap Act's "color of law" exemption, 18 U.S.C. § 2511(2)(c), to CNN. But even if the Bergers are correct, the judgment reached by the Ninth Circuit would be affirmed because, as the district court held, a separate exemption, 18 U.S.C. § 2511(2)(d), permits parties *not* acting under color of law to record conversations, with one party's consent, for newsgathering or other non-tortious, non-criminal purposes. The Bergers ignore numerous decisions considering the precise issue presented in their Cross-Petition, all of which hold that § 2511(2)(d) —both on its face and by specific congressional intent— permits the type of newsgathering activity CNN engaged in here. Furthermore, the Bergers attempt to manufacture a "conflict" between a Seventh Circuit case and the opinion below regarding the meaning of the phrase "color of law" in the Wiretap Act, but there is no material conflict: The courts' reasoning is in complete accord.

Second, the Ninth Circuit's decision not to enjoin CNN from future broadcasts of news footage follows from an unbroken line of authority, from this Court and others, reiterating the "heavy presumption" against the constitutionality of any prior restraint of the news media. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The Bergers' argument—that allegations of improper newsgathering by CNN somehow justify enjoining the telecast of the acquired truthful news footage—

has been considered and universally rejected by this Court and others.

The Bergers' Cross-Petition ignores the fundamental fact that CNN in this case was doing what our Constitution assumes the news media will do—gather and report the news. Instead, the Bergers seek to characterize the ordinary and longstanding journalistic practice of reporting on government law enforcement activities as nothing but a calculated intrusion on the rights of criminal suspects. According to the Cross-Petition, the fact that CNN was reporting on newsworthy events is irrelevant, because the resulting news coverage may also be "sensational" and entertaining. Cross-Pet. at 5. For the Bergers, it is but a small step from demeaning (or deliberately disregarding) CNN's exercise of its First Amendment newsgathering function, to asserting that civil [1] liability ought to attach to CNN's actions, and that the courts may, by injunction, control CNN's future editorial decisions. These contentions are inconsistent with First Amendment principles and not worthy of this Court's review.

A. Factual Background

Cross-Respondents herein are Cable News Network, Inc., a twenty-four-hour television news network; its parent company Turner Broadcasting System, Inc. ("TBS"); Jack Hamann, a news reporter for CNN; and Robert Rainey and Donald Hooper, CNN employees who served as Hamann's camera crew.[2]

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[1] Under the Bergers' interpretation of the Wiretap Act, CNN and other news outlets recording conversations for newsgathering purposes also could be criminally liable. *See* 18 U.S.C. § 2511(1). "Such a threat is inconsistent with the guarantees of the first amendment." S. Rep. No. 99-541, 99th Cong., 2d Sess. 17, *reprinted in* 1986 U.S.C.C.A.N. 3555, 3571 (§ 2511(2)(d) specifically intended to clarify that journalists may record conversations so long as one party consents).

[2] Cross-Petitioners Paul and Erma Berger, plaintiffs below, brought two separate actions arising from the events described here. One named Cable News Network, Inc. and Hamann as defendants; the other named TBS, Rainey, and Hooper, as well as

Reporter Hamann is a Seattle-based correspondent for CNN who regularly reports on environmental matters and other news from the western United States. ER *Hamann* 5/2; *Hanlon* 8/2.[3] In 1993, while working for the CNN Environment Unit, he heard reports that western ranchers were poisoning endangered species in violation of federal law, often with impunity since local officials and juries were sympathetic toward the ranchers' efforts to protect livestock from predators. ER *Hamann* 5/2; *Hanlon* 8/2. Hamann decided to investigate what, if anything, federal authorities were doing to stop the illegal wildlife killings.

In the course of his newsgathering process, Hamann learned that the United States Fish and Wildlife Service ("FWS") was investigating a report that a Montana rancher—who, unbeknownst to Hamann at the time, was Paul Berger—was killing eagles unlawfully on his 75,000-acre property, and that the FWS would be searching the rancher's property for evidence of this criminal activity.[4]

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certain federal government actors (the United States of America, an Assistant U.S. Attorney, and four U.S. Fish and Wildlife Service ("FWS") agents) as defendants. The actions proceeded on identical courses in the district court and were treated as consolidated on appeal. App. 7a, 49a n.1. CNN has petitioned for certiorari seeking review of the Ninth Circuit's holdings (1) that CNN was a "joint actor" with the FWS agents and thus acted under color of law for purposes of *Bivens* liability, and (2) that law enforcement agents violate clearly established Fourth Amendment rights when they permit journalists to observe and record the execution of a warrant, 66 U.S.L.W. 3783 (U.S. May 26, 1998) (No. 97-1914)| The individual government agents filed a separate petition for certiorari seeking review of the Ninth Circuit's qualified immunity and Fourth Amendment holdings. 66 U.S.L.W. 3783 (U.S. May 26, 1998) (No. 97-1927).

[3] The excerpts of record ("ER") refer to the two volumes Cross-Petitioners filed in each of the two actions ("*Hamann*" or "*Hanlon*," respectively). The references are to tab number within the ER, exhibit within the tab, and page number within the exhibit.

[4] Mr. Berger was suspected of deliberately poisoning and shooting eagles—and not, as the Cross-Petition asserts, at 7 n.4, of merely killing eagles in the course of his efforts to also kill predatory coyotes. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 8/page 13. *See*

The FWS investigation of Berger had begun *before* Hamann became interested in reporting on illegal wildlife killings; it had been ongoing for at least two months at the time the FWS gave CNN permission to observe the search. App. 4a. This permission was confirmed in a letter stating that the government "agrees to allow CNN to accompany USFWS Agents as they execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993." The letter further stated that CNN retained "complete editorial control" over any footage it recorded of the search, but that CNN would not show any footage until such time as doing so posed no risk to any defendant's fair trial rights.[5]

As part of its coverage of the search, CNN attended a briefing for FWS agents the day before the warrants were executed. Hamann asked a few questions regarding the nature of the poisons allegedly used by Berger and local ranchers' views about federal authorities, ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 5/pages 6-8, but the record contains no evidence that CNN played any role in the briefing, assisted in planning or executing the search, or coordinated in any way with the government beyond what was necessary to arrange to observe and record the search for newsgathering purposes.[6]

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also id. Tape 7/page 11, which records Berger as stating, "I'll kill every son of a bitch [eagle] I get a chance to."

[5] This was the complete substance of the letter, which is set out in full in the Ninth Circuit opinion. App. 4a-5a. The letter merely grants CNN permission to *accompany* the government agents. It plainly does not, as the Bergers assert, give CNN " 'exclusive access' to the Berger Ranch to use as the backdrop for, and the search as a source of, video and audio recordings . . . ." Cross-Pet. at 6. Nor does CNN therein agree to "grant[] the Government's express desire to publicize its efforts to enforce environmental laws." *Id.* at 7. The agreement expressly states that CNN "shall not be obliged to use the footage," App. 5a, belying the Bergers' suggestion of any *quid pro quo* arrangement.

[6] Specifically, the record provides no support for the Bergers' unsubstantiated claim that CNN was "made privy to confidential

On the day of the search, the large group of government agents executing the search warrants drove to the ranch, followed in a separate private vehicle by Hamann, Rainey, and Hooper. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 6/page 3-Tape 7/page 2. One of the government vehicles had a small, fixed CNN camera visibly mounted on its hood facing into the vehicle, and FWS agent Joel Scrafford wore a microphone that transmitted sound to the CNN crew. App. 6a; ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 7/pages 1-23-Tape 20/page 1.[7] It is undisputed that Scrafford consented to wearing the microphone and to having his conversations recorded by CNN. App. 22a, 42a, 54a.[8] The CNN crew members were dressed in casual clothes and thus were readily distinguishable from many of the law enforcement officers on the scene who were either in uniform or wore hats or jackets with government agency patches or labels, and were visibly armed with handcuffs and guns. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 6/pages 3-4.[9]

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information about the Bergers and the criminal investigation . . . ." Cross-Pet. at 7-8 n.5.

[7] Contrary to the Bergers' assertions, Cross-Pet. at 5, the CNN crew did not ride in any government vehicle.

[8] It also is undisputed that Scrafford, in his capacity as an FWS agent, participated in the investigation of Paul Berger's suspected criminal activity and in the execution of the valid search warrants. The Bergers do not explain their characterization of Scrafford as a "human 'boom mike' " and "simply a piece of recording equipment." Cross-Pet. at 9, 18, 22. Whether or not this is meant as hyperbole, it is misleading to the extent it implies that Scrafford played no role in executing the warrants or investigating Paul Berger. A more accurate characterization of the undisputed facts surrounding Scrafford's activity is that he was an FWS agent, on the Berger property to execute a valid search warrant, who also agreed to facilitate CNN's newsgathering efforts by wearing a microphone.

[9] The Bergers' claim, Cross-Pet. at 8, that Agent Scrafford threatened to arrest Paul Berger if he was uncooperative, is misleading. The record indicates that when the agents first encountered Berger, Scrafford told him, "[W]e aren't going to arrest you." ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 7/page 7. Later, Scrafford told Berger that if Berger did not cease interfering with

While the FWS agents executed the warrant, the journalists videotaped portions of the agents' authorized search of the ranch, its outbuildings and surrounding public roads. App. 6a. CNN never entered the Bergers' home, though Agent Scrafford did, with Berger's consent. *Id.*[10] Berger's voluntary conversations with the FWS agent both inside and outside the house were recorded through the microphone Scrafford was wearing. *Id.*

During the search, which lasted several hours, the CNN crew interviewed one of the government officials present for the execution of the warrant, Assistant United States Attorney Kris McLean. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 11/pages 2-8. McLean stated in the interview that the government's purpose in allowing CNN to record the FWS search was to educate the public that the government does enforce criminal laws protecting wildlife, and that there are consequences to illegally poisoning protected species. *Id.* page 8.

Based on evidence seized during the search, Berger was charged with violating federal laws that prohibit killing eagles. A jury convicted him of applying a pesticide to sheep carcasses with the intent to kill predators, including eagles, in violation of 7 U.S.C. § 136j(a)(2)(G). He was acquitted of three other charges. App. 7a.

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federal poison specialists trying to photograph poisons found on the property Scrafford would have no choice but to arrest him. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 8/page 3.

[10] The Bergers' assertion that Agent Scrafford "neither requested nor received permission from [the Bergers] to enter their residence" is shown by the record to be untrue. The tape log records the following conversation between Scrafford and Paul Berger outside the Berger home, while Mrs. Berger was inside:

> Scrafford: Do you want me to try and explain it, or do you want to talk to her?
>
> Berger: No, come on in . . .
>
> Scrafford: Okay . . . just . . . don't want to get her upset any more than we have to.

ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 7/page 16.

Seven months after the search, and two months after Paul Berger's criminal conviction, CNN used portions of its footage of the search on its regular environmental news programs "Earth Matters" and "Network Earth" as part of its news coverage of government efforts to protect endangered species. The footage made up only a portion of each program. The programs were shown in October 1993 and several times in 1994. App. 2a; ER *Hamann* 5/9; *Hanlon* 8/9. They have not been shown since 1994.

B. Proceedings Below

After Berger's criminal conviction, he and his wife brought these civil actions against CNN and the government. The Bergers sued under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), claiming primarily that the federal agents violated Plaintiffs' Fourth Amendment rights by permitting the news media to attend and record the search, and that by observing the search, CNN acted under color of federal law and thus would be accountable for a Fourth Amendment violation as if it too were a government actor. App. 3a. The Bergers also sued CNN for alleged violations of the Wiretap Act, for a variety of state law claims, and for an injunction barring further broadcasts of the news footage recorded during the execution of the search warrant. *Id.*

The district court granted summary judgment for CNN on all issues. The court found, first, that the Bergers could not show that CNN acted under color of federal law—one of the requisites for *Bivens* liability. "When a private party, such as [CNN], is present during a search as a means of furthering its own interests, it is not acting under color of law and is not liable under *Bivens*." App. 41a; *accord, id.* at 54a.[11]

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[11] The requirement under *Bivens* that the defendant act under color of federal law is akin to the "under color of state law" showing required under 42 U.S.C. § 1983. *Butz v. Economou*, 438 U.S. 478, 500-01 (1978). Both standards generally are treated as the

As for the Bergers' claim under the Wiretap Act, which permits civil suits for the intentional interception of certain communications, the district court held that one of the Act's provisions expressly permitting the recording of communications applied. App. 21a, 41a, 54a; 18 U.S.C. §§ 2511, 2120. That provision, in pertinent part, permits the interception of oral communications (1) by a party "not acting under color of law," (2) where one of the parties to the communication has given prior consent to the interception, (3) so long as the communication is not "intercepted for the purpose of committing any criminal or tortious act . . . ." 18 U.S.C. § 2511(2)(d). The district court found CNN was not acting under color of law (a logical extension of its holding that CNN was not liable under *Bivens*), and that the FWS agents consented to having CNN record their conversations. The court also held that CNN had not recorded the conversations for the purpose of committing a crime or tort. "Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain." App. 42a, 55a.

The Ninth Circuit affirmed that CNN did not violate the Wiretap Act, but on different grounds. To understand why, reference must be made to the circuit court's conclusion on the Bergers' principal claim: The court found for the Bergers on their *Bivens* claim, holding that the search of the Berger ranch was nothing more than a joint government/media venture, under the guise of a legitimate law enforcement action, to acquire publicity for the FWS and television footage for CNN. App. 2a-3a, 9a-10a. Reversing the district court, the Ninth Circuit found that the FWS violated the Bergers' Fourth Amendment rights by inviting journalists to observe the search of the property, and that CNN could be held liable as well by virtue of its joint planning and partici-

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equivalent of the "state action" showing required to assert constitutional violations in other contexts. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 924, 928-29 (1982).

pation with the government in the search. App. 9a-10a, 17a-21a.

The Ninth Circuit did not consider, as the district court did, whether 18 U.S.C. § 2511(2)(d) expressly permitted CNN to record the FWS agent's conversations on the Berger ranch. Rather, the court turned in the first instance to 18 U.S.C. § 2511(2)(c), which applies on its face to persons "acting under color of law," and permits such persons to record conversations where one of the parties consents. The court recognized that "the phrase 'under color of law' in the wiretap context is not equivalent to the scope of the phrase in the general [42 U.S.C.] section 1983 or *Bivens* context," in that 18 U.S.C. § 2511(2)(c) "was not created to exempt all government employees from liability . . .: Its core aim must have been to exempt those acting under law enforcement authority." App. 21a-22a. Thus, the court found that CNN satisfied the statutory "color of law" requirement because "both the federal appellees and the media appellees were acting under authority of a search warrant." App. 22a. Though the court's analysis on this point is cursory, it clearly followed the internal logic of its *Bivens* finding: Since the court found that CNN acted under color of law for *Bivens* purposes—based on CNN's alleged participation with the FWS agents in the agents' prosecution of their law enforcement duties—the court also concluded that CNN was acting under law enforcement authority for Wiretap Act purposes.

The Bergers also sought an injunction preventing further broadcast of any of the news footage gathered during the search. Both the district court and the Ninth Circuit recognized that the Bergers' claim "is essentially a request for a prior restraint, which carries a 'heavy presumption against its constitutional validity.'" App. 25a (*quoting CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (Blackmun, Circuit Justice 1994)); *accord* App. 42a, 55a. The district court held that the Bergers failed to show this "is an exceptional case that would justify the

imposition of a prior restraint." App. 43a, 56a. The Ninth Circuit held that "[e]ven though the Bergers have alleged triable claims for damages arising out of the manner in which the media appellees obtained the material, such allegations are not sufficient to support the imposition of an injunction." App. 25a (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

REASONS THE WRIT SHOULD BE DENIED

The Cross-Petition should be rejected because the issues it raises do not require review by this Court. The Ninth Circuit's judgment that CNN did not violate the Wiretap Act by virtue of § 2511(2)(c)'s "color of law" exception does not conflict in any material or important fashion with any other court's decision. Further, even if the Court were to find that CNN did not act under color of law, an independent basis exists for affirming the Ninth Circuit's decision that CNN did not violate the Wiretap Act. Specifically, if the Ninth Circuit is incorrect and CNN did *not* act under color of law for Wiretap Act purposes, then CNN's recordings were expressly permissible under 18 U.S.C. § 2511(2)(d). Since one or the other of these Wiretap Act provisions must, as a matter of simple logic, apply, the Ninth Circuit's judgment would be affirmed no matter how this case proceeds.

Regarding the rejection, by both the Ninth Circuit and the district court, of the Bergers' requested injunction, this case does not raise the question presented in the Cross-Petition: The Bergers argue from the premise that a "final judicial determination" has already been made that CNN's conduct was illegal or unconstitutional. In fact, there is no judgment against CNN; the Ninth Circuit simply reversed the district court's grant of summary judgment in CNN's favor and remanded for further proceedings. More significantly, the Bergers' requested prior restraint fails to overcome the heavy presumption against such injunctions. This Court and others consistently have ruled that the types of allegations the Bergers have leveled against CNN do not, even if proven true, provide a suffi-

cient basis for "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 542 (1976). The Ninth Circuit's decision is consistent with, and follows from, the decisions of this Court and others.

I. THE HOLDING THAT CNN DID NOT VIOLATE THE WIRETAP ACT WAS CORRECT, DOES NOT CONFLICT WITH ANY OTHER DECISION, AND CAN BE UPHELD ON GROUNDS INDEPENDENT FROM THOSE UPON WHICH THE NINTH CIRCUIT RELIED.

The Wiretap Act contains two broad provisions that expressly permit the recording of oral communications where one participant to the communications consents. One applies to parties "acting under color of law," 18 U.S.C. § 2511(2)(c), the other to parties "not acting under color of law." *Id.* § 2511(2)(d). As a matter of simple logic, CNN must fall into one of these two categories.[12] If CNN did not act under color of law—as the district court found, as CNN has always contended, and as the Bergers themselves only now assert—then § 2511(2)(d) exempts CNN from any Wiretap Act liability. The Bergers' contention that § 2511(2)(d) would not apply because CNN acted "for the purpose of committing any criminal or tortious act" ignores the plain language of the statute, mischaracterizes the provision's legislative history, and is at odds with the relevant case law, all of which hold that journalists who record conversations with the consent of one party in the course of newsgathering are protected from Wiretap Act liability. If CNN did act under color of law, as the Ninth Circuit found, then on its face § 2511(2)(c) applies to permit CNN's actions.

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[12] CNN's contention is that it did not act under color of law in any way—neither for purposes of civil-rights liability *nor* under the Wiretap Act. *See* Pet. for Cert., 66 U.S.L.W 3783 (U.S. May 26, 1998) (No. 97-1914). But, as will be shown, CNN's conduct expressly is permitted whether or not it acted "under color of law" for purposes of the statute.

Because the judgment below must be upheld on one ground or the other, the Cross-Petition should be denied.[13]

A. Review by This Court Is Unnecessary Because the Wiretap Act Expressly Permits Journalists To Record Conversations for Newsgathering Purposes.

As CNN has argued in its Petition for Certiorari, the Ninth Circuit committed grave constitutional error in subjecting CNN, a private, independent news organization, to constitutional *Bivens* liability as if it were an arm of the government. But regardless of whether this Court grants or denies that petition, or affirms or reverses the Ninth Circuit's *Bivens* ruling, the Ninth Circuit's holding that CNN did not violate the Wiretap Act still is correct and will not be disturbed. If CNN did not act under color of law for purposes of the Wiretap Act, then a separate exemption to Wiretap Act liability, 18 U.S.C. § 2511(2)(d), necessarily applies. This separate ground for affirming the decision below means there is no need to reach the Wiretap Act issues, and certiorari is thus unwarranted. In addition, because the plain language of the statute, the specific legislative history of § 2511(2)(d), and decisions of other courts all unequivocally agree that section (2)(d) exempts from Wiretap Act liability the type of recording engaged in by CNN in this case, review by this Court simply is not called for.

Section 2511(2)(d) states that it is not unlawful for a person not acting under color of law to intercept a wire communication where a participant to the conversation

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[13] A respondent "may, of course, defend the judgment below on any ground which the law and record permit"—including grounds considered only in the district court—"provided the asserted ground would not expand the relief which has been granted." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). In opposing certiorari, it is appropriate for respondents to demonstrate "that the presence of other meritorious arguments shows that the decision below is correct without regard for the question sought to be raised by the petition . . . ." Robert L. Stern et al., *Supreme Court Practice* 373 (7th ed. 1993).

has consented to the interception, "unless such communication is intercepted *for the purpose* of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(d) (emphasis added). Agent Scrafford's consent to wear CNN's microphone and have his conversations recorded is not disputed. App. 22a. Therefore, assuming CNN did not act under color of law, the only remaining issue is whether CNN recorded the conversations "for the purpose of committing" a crime or tort.

On its face, § 2511(2)(d) requires examination of a party's "purpose" in recording a communication. "[T]he critical question under section 2511(2)(d) is *why* the communication was intercepted, not *how* the recording was ultimately used." *Russell v. American Broad. Co.*, 23 Med. L. Rptr. 2428, 2431 (N.D. Ill. 1995). A plaintiff must show the defendant "either intended to break the law or commit a tort against him . . . ." *Thomas v. Pearl*, 998 F.2d 447, 451 (7th Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994). Thus, a college basketball coach who recorded conversations with a potential recruit, after learning a rival school had offered the recruit improper perks, was protected from Wiretap Act liability by § 2511(2)(d) because the coach's intent was not to commit a tort or crime, but rather was "to call attention to unfair and illegal practices by a rival university." *Id.* at 452.[14]

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[14] Though relying almost completely on *Thomas* for its discussion, in *dicta*, of the contrast between the meaning of "color of law" in 18 U.S.C. § 2511(2)(c) and in the civil-rights contexts, Cross-Pet. at 19-20, the Bergers seek to disavow *Thomas'* holding that the defendant had *not* violated the Wiretap Act. Cross-Pet. at 20. The Bergers attempt to distinguish the portions of the case that are unfavorable to their position by claiming that the plaintiff, Thomas, "did not allege any tort other than a wiretap violation alone." This is grossly misleading. After first noting that, "[a]lthough inartful, Thomas' complaint could be read to state a cause of action for any of three privacy torts," the Seventh Circuit went on to evaluate Thomas' wiretap claim on the assumption that the torts were properly alleged. 44 F.3d at 451-53. The court found that because the defendant's purpose was not tortious, his actions were permissible under § 2511(2)(d). *Id.*

Newsgatherers who, with one party's consent, record conversations for use in news reports are not acting for criminal or tortious purposes, and thus are protected from Wiretap Act liability by § 2511(2)(d). *Desnick v. American Broad. Co.*, 44 F.3d 1345 (7th Cir. 1995). In *Desnick*, producers of a television news program sent undercover reporters into eye surgery centers with hidden cameras and sound recorders to show deliberate misdiagnosis for financial gain. Plaintiffs claimed the newsgathering was tortious and violated the Wiretap Act. The court affirmed dismissal of the Wiretap Act count, finding that under § 2511(2)(d) the newsgatherers did not enter the eye centers for the purpose of committing a tort or crime. Significantly, even though the court found that "[m]aybe the program as it was eventually broadcast was tortious," the exemption from Wiretap Act liability applied because "[t]he defendants did not order the camera-armed testers into the Desnick Eye Center's premises in order to commit a crime or tort." *Id.* at 1353. The defendants' *purpose* was to gather news, and thus they were entitled to the protection of § 2511(2)(d). *Id.*

Other cases likewise hold that journalists engaged in newsgathering are not acting for criminal or tortious purposes and thus do not violate the Wiretap Act. *Deteresa v. American Broad. Co.*, 121 F.3d 460 (9th Cir. 1997) (broadcast, over plaintiff's objection, of video showing reporter and plaintiff talking is protected by § 2511(2)(d)), *cert. denied*, 118 S. Ct. 1840 (May 26, 1998); *Sussman v. American Broad. Co.*, 971 F. Supp. 432, 435 (C.D. Cal. 1997) ("[W]here a journalist is party to a conversation, the recording of such a conversation is not criminal or tortious conduct within the meaning of" § 2511(2)(d));[15] *Russell*, 23 Med. L. Rptr. 2428 (no Wire-

[15] *Sussman* is distinguishable from the instant case in that the reporter there participated in the conversations she recorded, whereas CNN was not a party to the conversations in question, but recorded them with a party's consent. The distinction, however, is entirely irrelevant because § 2511(2)(d) applies equally to both situations.

tap Act liability for hidden camera news investigation of sanitary conditions at plaintiff's fish market).

The relevant question in this case is not, as the Bergers assert, whether CNN's recording *eventually is held to be* tortious or criminal. Rather, as *Desnick* and *Russell* make clear, the relevant question under the Wiretap Act is *why* CNN chose to record Agent Scrafford's conversations during the search of the Berger ranch. As both the district court and the Ninth Circuit held, the undisputed answer is that CNN's purpose was to gather news information to use in its coverage of an important environmental issue, not to commit any crime or tort. Indeed, the district court, in a finding that was not disturbed by the Ninth Circuit, expressly held that the recordings were not made for criminal or tortious purposes. "Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain." [16] App. 42a, 55a; *see also* App. 23a (Ninth Circuit noting, in reversing district court's dismissal of state trespass claims, that "the officers invited the media for newsgathering, not for law enforcement").

Thus, the Bergers' Cross-Petition ignores the plain language of the statute and the case law, both of which make clear that 18 U.S.C. § 2511(2)(d) expressly permits consensual recording by parties acting for other than criminal or tortious purposes. Instead, the Bergers rely principally on a conclusory and mistaken interpretation of the Wiretap Act's broad legislative history. Cross-Pet. at 21-22. The Bergers assert that Congress intended the § 2511 exceptions to protect solely the "legitimate needs of law enforcement." *Id.* at 21 (not citing any congressional statement, but rather citing Department of Justice comments on bill). Under the Bergers' syllogism,

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[16] It is well recognized in other contexts that commercial profit in no way diminishes the protections available for newsgathering. *See Harte-Hankes Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989).

CNN cannot benefit from § 2511 because CNN did not record Agent Scrafford's conversations for any legitimate law enforcement purpose.[17] *Id.*

This reasoning is fatally flawed. Statutory interpretation begins not with broad assertions about legislative history, but rather "with the language of the statute." *Bailey v. United States*, 516 U.S. 137, 144 (1995). The plain language of § 2511(2)(d) states that the provision applies to individuals "not acting under color of law."[18] Also, the consensual recordings permitted by the statute are not limited to those that further law enforcement objectives; the statute plainly states that any such recording not done for tortious or criminal purposes is permissible.

Second, to the extent legislative history is relevant, the specific history of § 2511(2)(d) shows that Congress unequivocally intended for that provision to exempt journalists engaged in newsgathering from Wiretap Act liability. As originally enacted in 1968, § 2511(2)(d) made it unlawful to record conversations not only for tortious or criminal purposes, but also "for the purpose of committing any other injurious act." In 1986, Congress deleted the "injurious" purpose language *specifically to*

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[17] The Bergers' syllogism also fails to recognize that the FWS had a legitimate law enforcement purpose for allowing CNN to cover its activities: to show the public there are consequences to illegally poisoning protected species. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 11/page 8 (interview with AUSA McLean). "It is in fact a legitimate function of law enforcement to facilitate accurate reporting on law-enforcement activities and to improve public oversight of those activities by use of the press." *Wilson v. Layne*, 141 F.3d 111, 118 (4th Cir. 1998) (*en banc*), *petition for cert. filed*, —— U.S.L.W. —— (U.S. July 7, 1998) (No. 98-83).

[18] Indeed, the Bergers' argument collapses on itself. The Bergers, in discussing § 2511(2)(c), argue that under the Wiretap Act, a party only acts under color of law where he or she is furthering a law enforcement action. Cross-Pet. at 18-21. What they fail to acknowledge is that by their own reasoning, it necessarily follows that the phrase "*not* acting under color of law" in § 2511(2)(d) must encompass individuals who are *not* furthering law enforcement aims.

clarify that journalists who record a conversation with the consent of one of the participants do not violate the Wiretap Act. As the Senate Report of the 1986 amendment explained,

> In numerous court cases the term "other injurious purpose" has been misconstrued.[19] Most troubling of these cases have been attempts by parties to chill the exercise of first amendment rights through the use of civil remedies under [the Wiretap Act]. . . . This interpretation places a stumbling block in the path of even the most scrupulous journalist. Many news stories have been brought to light by recording a conversation with the consent of on[l]y one of the parties involved—often the journalist himself.

S. Rep. No. 99-541, 99th Cong., 2d Sess. 17, *reprinted in* 1986 U.S.C.C.A.N. 3555, 3571. The report explains that the amendment is necessary to assure that journalists do not face potential civil and criminal Wiretap Act liability for recordings "made in the ordinary course of responsible news-gathering activities and not for the purposes of committing a criminal act or a tort." *Id.*

Given this specific congressional intent that journalists engaged in newsgathering be exempt from Wiretap Act liability, as well as the absence of any conflict among the courts of appeal on the meaning of the post-1986 language of § 2511(2)(d), it is clear that CNN's conduct did not violate the Wiretap Act. Review by this Court is unnecessary.

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[19] The Senate Report states that the 1986 amendment to § 2511(2)(d) was specifically intended to reject the holding of *Boddie v. American Broad. Co.*, 731 F.2d 333 (6th Cir. 1984), in which a reporter secretly recorded an interview with plaintiff and used a portion of the recording in a news broadcast. The court's conclusion, specifically rejected by Congress, was that the plaintiff could recover under the Wiretap Act by showing that the newsgathering was intended to insult or injure the plaintiff, even though the conduct was not tortious or criminal. *See also Benford v. American Broad. Co.*, 502 F. Supp. 1159 (D. Md. 1980) (holding, prior to 1986 amendment, that § 2511(2)(d) does not as a matter of law exempt from Wiretap Act liability hidden camera recording used in news broadcast), *aff'd*, 661 F.2d 917 (4th Cir. 1981).

B. If, as the Ninth Circuit Found, CNN Acted Under Color of Law for *Bivens* Purposes Based on CNN's Alleged Association With Law Enforcement Agents, Then 18 U.S.C. § 2511(2)(c) Applies and Expressly Exempts CNN From Wiretap Act Liability.

Under 18 U.S.C. § 2511(2)(c), a party who acts "under color of law" is permitted to record a conversation with one participant's consent, regardless of the recording party's purpose. Though CNN disputes the Ninth Circuit's conclusion that CNN acted under color of law for *Bivens* purposes, if that conclusion is correct, then CNN also acted under color of law for purposes of the Wiretap Act for the reasons discussed below, and its conduct, thus, was permissible under § 2511(2)(c).

On the Bergers' *Bivens* claim, the Ninth Circuit held that CNN could be held liable for an alleged violation of the Bergers' Fourth Amendment rights. It reached this conclusion by finding, first, that the FWS violated the Fourth Amendment by allowing the news media to observe and record its search of the Berger ranch. App. 9a-10a. Second, the court contended that CNN could be liable for this constitutional violation, even though as a private actor it normally would not be subject to the Fourth Amendment's strictures, because of its "joint action" with the government. App. 19a. This determination amounted to a finding that CNN acted "under color of law," as that term is used for purposes of establishing civil-rights liability. Specifically, the court found that CNN and the FWS agreed "to engage jointly in . . . the execution of a search warrant . . . ." App. 19a. CNN vigorously disagrees with the Ninth Circuit's conclusion that it acted "under color of law" when, for independent newsgathering purposes, it arranged to be present and record government officials' execution of a search warrant. However, the Ninth Circuit, having concluded that CNN's involvement with law enforcement officials meant that CNN acted under color of law for *Bivens* purposes, simply acted consistently when it held that CNN also acted under color of law for purposes of the Wiretap Act. App. 21a-22a.

The Bergers contend that the phrase "color of law" has a different meaning in the civil-rights context than it does under the Wiretap Act. Cross-Pet. at 19. Even if true, this argument does not help the Bergers. Only two courts—the Ninth Circuit in the opinion below and the Seventh Circuit in *Thomas*—appear to have considered the differences between the two "color of law" requirements,[20] and both agree that a party acts under color of law for purposes of 18 U.S.C. § 2511(2)(c) when it is "acting under law enforcement authority." App. 22a. Inherent in the Ninth Circuit's holding that CNN jointly planned and executed the search with law enforcement agents was the conclusion that "both the federal appellees and the media appellees were acting under authority of a search warrant," and thus that § 2511(2)(c) applies.[21]

Attempting to find some basis for review by this Court, the Bergers assert that the Ninth Circuit opinion is in conflict with *Thomas*. They are in error. *Thomas* arose in an entirely distinguishable factual context. A state college basketball coach allegedly recorded telephone conversations with a potential recruit in an effort to prove that a rival school had offered the recruit perks in violation of a collegiate athletic association's rules. 998 F.2d at 448.

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[20] "The vast majority of cases involving the § 2511(2)(c) 'color of law' exception focus on whether a party to the intercepted communications had truly 'consented' to the interception." *Omron Atl. Corp. v. Barr*, 990 F.2d 861, 864 n.8 (6th Cir. 1993). In this case, Agent Scrafford's consent is not disputed. App. 22a.

[21] The Ninth Circuit's analysis on this point is cursory, resting simply on the notion that because CNN was "acting under law enforcement authority," the exception to the Wiretap Act applied. App. 21a-22a. Read in context, however, it is clear that the court's holding on Wiretap Act liability is a direct result of its holding that CNN and the FWS were "joint government actors" and thus that CNN was to be treated in this case as if it were an arm of the government, acting "under the government's cloak of authority." App. 17a-21a. Having previously accepted the Bergers' theory that CNN acted under color of law *because* CNN in effect stood in the shoes of federal agents, the court acted consistently by concluding that CNN acted under color of law under the Wiretap Act as well.

The court held that the coach, though a state employee, did not act under color of law for purposes of 18 U.S.C. § 2511(2)(c). Just as in the Ninth Circuit opinion below, the court found that the statute's "color of law" requirement differed from the civil-rights "color of law" requirement, because § 2511(2)(c) was meant to apply in the law-enforcement context. The Seventh Circuit's concern was that, devoid of any link to law enforcement, broad application of § 2511(2)(c) "would confer on every last employee of federal, state and local government a free pass to record conversations without the second party's consent." *Id.* at 451. Because of the complete absence of any link between the basketball coach's job description and law enforcement activities, the coach did not act "under color of law" for purposes of the Wiretap Act. *Id.* Thus, *Thomas* held only that state employees with no connection to law enforcement cannot benefit from § 2511(2)(c); it expressly did not hold that § 2511(2)(c) applied only to "law enforcement officers acting within the scope of their authority." [22]

In sum, the Bergers cite no evidence that the color of law requirement of 18 U.S.C. § 2511(2)(c) has proven difficult for courts to administer or otherwise requires clarification from this Court. Though "color of law" may not be defined identically for purposes of § 2511 and

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[22] *Thomas* also is distinguishable in that its analysis was not complicated by a finding that the defendant was a state actor by virtue of the "joint action" theory, as was the Ninth Circuit opinion here. The coach in *Thomas* clearly was a state actor and would have been deemed to act under color of law had he been sued on a civil-rights theory. 998 F.2d at 450. The question was whether he acted under color of law under the Wiretap Act. In holding he did not, the court's prime distinction was between public officials having and not having law enforcement ties. In contrast, the "color of law" question in this case is whether purely private actors who, by virtue of joint action with government *law enforcement officials*, are being treated as law enforcement officials for civil-rights liability also should be treated as law enforcement officials for Wiretap Act purposes. This question was not present in *Thomas* or in any other case cited by the Bergers.

in cases alleging civil-rights liability, the courts are in agreement that a party recording communications in the course of a law enforcement action or investigation is acting under color of law and thus benefits from the § 2511 (2)(c) exemption. App. 21a-22a; *Thomas*, 998 F.2d at 451; *see also Omron Atl. Corp. v. Barr*, 990 F.2d 861, 865 (6th Cir. 1993) (private party who records conversation under nominal and irregular authority of government agents satisfies color of law requirement of § 2511 (2)(c)). In this case, the FWS agents—government officials searching the Bergers' ranch in the line of duty—were acting "under color of law" for both civil-rights and Wiretap Act purposes. The agents had a valid search warrant, and in fact gained evidence for their investigation that resulted in a criminal conviction of Paul Berger. App. 7a. Their actions were at all times connected to a law-enforcement search.[23] The question is whether CNN, a private actor, was a participant in this law enforcement action. The Ninth Circuit held that it was.[24] If that hold-

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[23] The Bergers assert the FWS did not act under color of law because the agents searched in a manner that exceeded the scope of the warrant. Cross-Pet. at 18. Even if the agents did exceed their authority, the Bergers' conclusion is erroneous because a law enforcement official is deemed to act "under color of law" not just for fully authorized conduct, but also for actions that exceed his authority. *Monroe v. Pape*, 365 U.S. 167 (1961).

[24] The Bergers suggest that the court's refusal to apply the "invited informer" doctrine somehow is relevant to the court's "color of law" analysis. Cross-Pet. at 17-18. This is incorrect. The Ninth Circuit simply held that the "invited informer" exception to government Fourth Amendment liability "was developed in cases where the government placed informers, often with recording devices, to obtain information for legitimate law enforcement purposes." App. 15a. Here, the court found the doctrine did not apply to CNN, which was recording for newsgathering purposes, not to inform on the Bergers.

Along similar lines, the Bergers assert, in support of their argument that CNN did not act under color of law for Wiretap Act purposes, that the FWS "neither applied for nor obtained court authority to wiretap the Bergers . . . because it knew or should have known that the Media's wiretap was illegal." Cross-Pet. at

ing is correct, then it follows that § 2511(2)(c) applies to CNN as it applies to the officers.

II. REVIEW OF THE NINTH CIRCUIT'S REFUSAL TO ISSUE A PRIOR RESTRAINT IS NOT WARRANTED.

This Court should reject the Bergers' request that it review the Ninth Circuit's refusal to issue an injunction barring CNN from telecasting the news footage it recorded of the FWS search. The Bergers have not come close to overcoming the "heavy presumption" against the constitutional validity of prior restraints. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). The arguments the Bergers present to justify their request are indistinguishable from arguments flatly and consistently rejected by this Court. As such, the Cross-Petition's arguments do not merit review.

A. This Case Does Not Raise the Question Presented in the Cross-Petition as There Has Been No "Final Judicial Determination" That CNN Did Anything Unlawful.

This case is an inappropriate vehicle for review by this Court because it does not raise the question presented. The Bergers assume, both in their "Questions Presented" and their substantive argument, that a "final judicial determination" has been made that CNN's newsgathering practices were illegal or unconstitutional. Cross Pet. at *i*, 24-26. That assumption is wrong. There has been no such final judicial determination. The appeal to the

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22. But the record contains no evidence why the FWS did not apply for court permission to record conversations with the Bergers; in any event such permission was unnecessary because the FWS agents did not "wiretap" the Bergers. CNN, not the FWS, did the recording at issue here. Because CNN did so with Agent Scrafford's consent, no court order was necessary—the recording for newsgathering purposes expressly was permitted either by 18 U.S.C. § 2511(2)(c) or (2)(d). The lack of any judicial authorization for CNN's permissible recording was irrelevant to the Ninth Circuit's conclusion that CNN and the FWS acted "under authority of a search warrant." App. 22a.

Ninth Circuit arose after the district court granted CNN's motion for summary judgment; the Ninth Circuit reversed in part and remanded for further proceedings to determine whether the Bergers could prove the defendants' liability. App. 26a. CNN's liability, if any, has yet to be adjudicated.

B. The Denial of the Bergers' Requested Prior Restraint of News Footage Follows From an Unbroken Line of Authority From This Court.

CNN denies that its recording of the FWS actions at the Berger ranch violated any law or constitutional provision. But even if the Bergers were to prevail at trial on their claims of damage arising from CNN's *newsgathering*, an injunction against the *telecast* of that footage would be unjustified.

This Court never has upheld a prior restraint on the news media. Instead, it has held that the First Amendment dictates that injunctions against publication or broadcast are impermissible in all but the most extraordinary circumstances. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 557-59 (1976). This Court's prior cases make clear that the Bergers do not come close to demonstrating such circumstances exist here: Even where the news media obtain information through allegedly improper means, the appropriate remedy is damages or criminal sanctions, not an injunction. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to suppress publication of Pentagon documents classified top secret and obtained by newspapers without authorization).

CBS, Inc. v. Davis, 510 U.S. 1315 (Blackmun, Circuit Justice 1994), is instructive. CBS surreptitiously videotaped a meat-packing operation and planned to televise the footage on a news broadcast. Plaintiffs sued in state court for trespass, other torts, and violation of a trade secrets statute and obtained a preliminary injunction barring CBS from broadcasting the undercover footage it gathered at the plant. In staying the injunction, Justice Blackmun held:

> Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in "exceptional cases." Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this "most extraordinary remedy" only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.

Id. at 1317 (citations omitted).

In issuing his ruling, Justice Blackmun rejected the same arguments the Bergers rely on to justify their requested injunction. Enjoining a broadcast is not appropriate even where the videotape in question "was obtained through 'calculated misdeeds' " of the broadcaster. *Id.* Similarly, alleged economic harm also is an insufficient basis upon which to impose a prior restraint. *Id.* "Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context." *Id.*

The Bergers argue that CNN's alleged (and still unproven) "violation of the Fourth Amendment empowers the courts to enjoin further action by the Media," including CNN's future use of the truthful news footage it obtained during the FWS search. Cross-Pet. at 26. The Bergers cite no authority for this assertion, and it appears that there is none.[25] As the First Circuit has noted, "[W]e have not found any case upholding a prior restraint issued to protect Fourth Amendment rights." *Matter of*

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[25] The Bergers refer to a footnote in Justice Harlan's concurrence in *Bivens* stating that courts have the power to enjoin invasions of constitutionally protected interests. Cross-Pet. at 26 (citing 403 U.S. at 404 n.5). This footnote is part of an analysis of the federal courts' general authority to grant *any* relief for violations of constitutional authority absent a specific grant from Congress. *Bivens*, of course, held that a Fourth Amendment violation does give rise to a federal cause of action for damages. Neither this holding nor Justice Harlan's concurrence in any way supports the kind of relief the Bergers seek.

Providence Journal Co., 820 F.2d 1342, 1350 n.55 (1st Cir. 1986), *opinion modified on reh'g on other grounds*, 820 F.2d 1354 (1987). Indeed, this Court has held that restraint of the news media is inappropriate even in the face of competing constitutional interests. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (Sixth Amendment right to fair trial did not justify prior restraint of press); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (constitutional authority of executive branch to conduct foreign affairs and enforce national security did not justify prior restraint); *accord Davis*, 510 U.S. at 1317.

Furthermore, neither an alleged nor actually proven violation of the Wiretap Act justifies a prior restraint on the news media. "While § 2511 proscribes certain conduct, it in no way provides for a prior restraint of the press in their exercise of their first amendment rights even if the press's conduct clearly violates § 2511." *In re King World Prods.*, 898 F.2d 56, 59 (6th Cir. 1990) (vacating injunction against use of videotape allegedly recorded in violation of Wiretap Act). The same is true of the other torts alleged by the Bergers. *See id.* at 60; *Providence Journal Co.*, 820 F.2d at 1350 ("That publication would prove embarrassing or infringe [plaintiff's] privacy rights is . . . an insufficient basis for issuing a prior restraint.").

The Bergers attempt to distinguish their claim from other requested prior restraints on the news media by arguing that they merely seek to enjoin further use of the "ill-gotten" news footage in the event a final determination is made that CNN recorded it unlawfully. Cross-Pet. at 6. This Court, however, rejected analogous reasoning in *Near v. Minnesota*, 283 U.S. 697 (1931). In *Near*, a state court issued a permanent injunction barring a newspaper from future publications of "malicious, scandalous and defamatory articles," after determining at trial that the paper previously had published such articles. *Id.* at 705. Along the lines of the Bergers' argument that

their requested injunction is needed to prevent CNN "from using the fruits of its unlawful newsgathering," Cross-Pet. at 24, the state in *Near* defended its injunction as necessary to protect the public from a publication that was in the " 'business' of publishing defamation." 283 U.S. at 720. The Court rejected this reasoning:

> If . . . the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. . . . If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition.

Id.[26] The same is true in this case. If CNN had the right to telecast its footage of the FWS search free from prior restraint in the first instance, then a permanent injunction against some future use of the footage also is unjustified.

Similarly, other courts have held that an injunction barring broadcast or publication is an unconstitutional restraint on speech even when sought *after* the publisher is held liable for publication. *See, e.g., Georgia Soc'y of Plastic Surgeons v. Anderson,* 363 S.E.2d 140 (Ga. 1987) (reversing, as "an impermissible prior restraint" on free speech, injunction barring defendants from disparaging plaintiffs issued after defendants' publication found to be libelous);[27] *cf. Goldblum v. National Broad. Co.,* 584 F.2d 904, 907 (9th Cir. 1978) ("[T]he press

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[26] "[B]ut if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity," in the form of civil or criminal sanctions *after* publication. 283 U.S. at 714 (quoting 4 William Blackstone, *Commentaries* *151, 152).

[27] Some courts have approved narrow and limited injunctions barring defendants from continuing to make specific charges against plaintiffs after the charges have been found defamatory. *See, e.g., Lothschuetz v. Carpenter,* 898 F.2d 1200, 1208-09 (6th Cir. 1990) (Wellford, J., concurring and dissenting). Such cases are inapt here, however, since the Bergers seek to suppress truthful information.

may not be required to justify or defend what it prints or says until after the expression has taken place.").

The Bergers cannot—and do not—allege that future broadcasts, if any, of CNN's news footage would cause "great and certain" evil that "cannot be militated by less intrusive measures." *Davis*, 510 U.S. at 1317. The Bergers fail to allege any facts which would establish a threat of irreparable (much less "great and certain") harm from future broadcast of CNN's news footage, particularly given that the facts contained in the footage are true and have long since been established and publicized. CNN already has telecast portions of the videotape on multiple occasions (though not since 1994), and much of the information contained in the CNN news coverage was publicized at Paul Berger's criminal trial. But to the extent the Bergers are injured by future CNN broadcasts, they have failed to demonstrate why damages would in any way be an inadequate remedy.[28] In sum, the Cross-Petition should be denied because the Ninth Circuit correctly found the Bergers have no grounds for obtaining an injunction.

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[28] The Bergers' remaining arguments in support of their requested injunction similarly are meritless. Their assertion that a prior restraint somehow is justified because the First Amendment's "purpose is not to reward criminal, tortious and unconstitutional conduct," Cross-Pet. at 25, rests on the illogical proposition that something cannot possibly have effects outside of its purpose. More significantly, it again ignores the distinction between newsgathering and broadcasting. Even if the Bergers were able to prove the illegality of CNN's *newsgathering*, they still would not have justified prior restraint of ensuing *telecasts*.

Finally, the Bergers' reliance on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), Cross-Pet. at 25, is puzzling, as that case involved an injunction against police chokeholds and did not even discuss the First Amendment or the unique circumstances required to issue prior restraints on the news media.

CONCLUSION

As a matter of simple logic, CNN either did or did not act "under color of law," as that term is used in the Wiretap Act. Either way, recording a conversation with the consent of one of the participants for newsgathering purposes expressly is permitted under the Wiretap Act. Additionally, the Ninth Circuit correctly ruled that the Bergers failed to justify their extraordinary request to enjoin CNN from future telecasts of its news footage. For the reasons set forth herein, the Cross-Petition should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

PAUL W. BERGER and ERMA R. BERGER,

Cross-Petitioners,

v.

CABLE NEWS NETWORK, INC.,
TURNER BROADCASTING SYSTEM, INC.,
ROBERT RAINEY, DONALD HOOPER
and JACK HAMANN,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF CONTENTS

Page

THE CONDITIONAL CROSS-PETITION SHOULD BE GRANTED 1

THE MEDIA ARE NOT EXEMPT FROM WIRETAP LIABILITY 3

1. The Ninth Circuit Contravened This Court's Precedents 4

2. The Ninth Circuit Contravened The Seventh Circuit 5

3. There Is No Journalist's Exemption 7

ENJOINING ADJUDICATED WRONGFUL CONDUCT IS NOT A PRIOR RESTRAINT 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Ayeni v. CBS Inc., 848 F.Supp. 362 (E.D.N.Y. 1994) 3

Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), *aff'g*, *Ayeni v. CBS Inc.*, 848 F.Supp. 362 (E.D.N.Y. 1994) 3

Benford v. American Broadcasting Companies, Inc., 502 F.Supp. 1159 (D. Md. 1980) 7, 8

Berger v. New York, 388 U.S. 41 (1967) 3, 4, 7

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 1, 2, 5, 7

Boddie v. American Broadcasting Companies, Inc., 881 F.2d 267 (6th Cir. 1989) 8

Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) 9

Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) 9

Gelbard v. United States, 408 U.S. 41 (1972) 4, 5, 6

Katz v. United States, 389 U.S. 347 (1967) 3

Los Angeles v. Lyons, 461 U.S. 95 (1983) 9

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) 9

Silverman v. United States, 365 U.S. 505 (1961) 9

Thomas v. Pearl, 998 F.2d 447 (7th Cir. 1993) 2, 6, 7, 9

United States v. Clouston, 623 F.2d 485 (6th Cir. 1980) 3

United States v. Koyomejian, 946 F.2d 1450 (9th Cir. 1991) 3

United States v. Wright, 667 F.2d 793 (9th Cir. 1982) 3

TABLE OF AUTHORITIES – Continued

Page

STATUTES

United States Code, Title 18
§§ 2510, 2511, *et seq*.....1, 2, 5, 6, 7, 8

§ 2515.....4

§ 2516.....6

§ 2518.....5, 6

§ 3105.....3

MISCELLANEOUS

Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101, 100 stat. 1848, 1850 (1986).....7

CROSS-PETITIONER'S REPLY BRIEF

The Bergers hereby reply to the Media's opposition to the Conditional Cross-Petition for Writ of Certiorari ("X/Opp"). The Media's opposition is a strained attempt to circumvent the obvious: that the Ninth Circuit was incorrect as a matter of law in disregarding this Court's constitutional restrictions on the use of wiretaps and the Seventh Circuit's interpretation of the "color of law" exemption under the Wiretap Act, in concluding that the Media were exempt from liability under § 2511(2)(c) of the Wiretap Act.[1] By focusing their attack on the Cross-Petition to disputing facts, the Media underscore the relevance of the legal issues presented and need for this Court's review.

THE CONDITIONAL CROSS-PETITION SHOULD BE GRANTED

There is no dispute that the Media hid a microphone on a Government Agent who entered the Bergers' residence which was expressly excluded from the search warrant and surreptitiously recorded the Bergers' private conversations without judicial authority and for no law enforcement purpose.[2] Unable to refute these and other facts which the Ninth Circuit found constituted "state action" for liability under *Bivens*,[3] the Media capitalize on this status by arguing that their joint conduct with the

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[1] *See* Electronic Communications Privacy Act of 1986 ("Wiretap Act"), 18 U.S.C. §§ 2510, *et seq.*

[2] The Government Agents' opposition to the Bergers' Conditional Cross-Petition ("Fed/Opp") is an attempt to re-argue the qualified immunity issue raised in their Petition for Writ of Certiorari and should be disregarded. The Government Agents are not Cross-Respondents to the Cross-Petition and the issues presented do not apply to them.

[3] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Government Agents was also under "color of law," rendering them exempt from liability under § 2511(2)(c) of the Wiretap Act. X/Opp [at page] 19-23. While the Ninth Circuit recognized that the scope of "color of law" under *Bivens* is not equivalent to that under § 2511(2)(c) of the Wiretap Act (App. 21a), it did not apply the appropriate standard articulated by the Seventh Circuit in *Thomas v. Pearl*, 998 F.2d 447 (7th Cir. 1993). Thus, by asserting that the Ninth Circuit was correct to exempt them from Wiretap Act liability, when the Seventh Circuit's "color of law" standard was not applied, the Media effectively concede that the basis for the Ninth Circuit's decision is in conflict with the Seventh Circuit, which serves to support the basis for this Cross-Petition.[4] The Media are also wrong to argue that journalists are exempt from liability under the 1986 amendment to Section 2511(2)(d) of the Wiretap Act. X/Opp 13-18. Nor are the Media correct in

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[4] It is unfortunate that the Media deign to cite the record out of context, attack Mr. Berger and assert that there is no evidence. *See* X/Opp 4-6, n.4-6, 9, *see also* Media Reply to Petition for Certiorari. The Ninth Circuit's opinion reflects the relevant facts and finding that the Media engaged in unlawful "joint action" with Government Agents. The undisputed evidence, for example, shows that the Media were improperly privy to confidential information about the Bergers. The Media admit being at the pre-search briefing (where Government Agents made statements about the Bergers and their investigation and disclosed information from the sealed warrants and declarations). The Media admit being present during the search involving a confidential criminal investigation. They admit using a wiretap in the Berger residence and attending numerous pre-search meetings with AUSA McLean who had a duty to keep quiet. *See* Agreement; Hamann's Producer Package Check List. The Media contradict themselves in asserting they never entered the Berger residence (X/Opp 7) while admitting that Agent Scrafford wore their microphone into the residence. X/Opp 7. The Bergers never consented to entry of the Media's microphone.

claiming that the Bergers' request for an injunction is a prior restraint.[5]

THE MEDIA ARE NOT EXEMPT FROM WIRETAP LIABILITY

Protection of the Bergers' Fourth Amendment rights is the paramount reason why this Court required that the Government Agents obtain search and seizure warrants before commencing their investigation on the Berger Ranch in March 1993. *See Katz v. United States*, 389 U.S. 347 (1967).[6] Protecting The Bergers' expectations of privacy is also why this Court has long enforced Fourth Amendment restrictions on the use of wiretaps. *See Berger v. New York*, 388 U.S. 41 (1967); *see United States v. Koyomejian*, 946 F.2d 1450, 1455 (9th Cir. 1991) (reiterating Congress's conclusion that enactment of the Wiretap Act requirements to protect individual privacy was intended to go substantially beyond the minimal constitutional constraints outlined in *Katz* and *Berger v. New York*). This case is no different.

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[5] Contrary to the Media's selective use of their tape transcript (X/Opp 6 n. 6), Agent Scrafford threatened to arrest Mr. Berger. ER 5/8:T8:3.

[6] The Media's presence and participation in the pre-search briefing and execution of the search warrant were neither justified to assist any law enforcement purpose nor expressly authorized under the search warrant. *See* 18 U.S.C. § 3105 (only persons authorized to assist the search); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), *aff'g, Ayeni v. CBS Inc.*, 848 F.Supp. 362 (E.D.N.Y. 1994); *United States v. Clouston*, 623 F.2d 485, 486 (6th Cir. 1980); *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982).

1. The Ninth Circuit Contravened This Court's Precedents

The Ninth Circuit's conclusory ruling that the Berger search warrant protected the Media's wiretap retroactively grants a general warrant which is contrary to this Court's precedent. *Id.* at 59 (where this Court in *Berger v. New York* outlined specificity and particularity warrant requirements and held that a New York electronic surveillance statute was unconstitutional for its expansive grant of authority like a general warrant in England). In *Gelbard v. United States*, 408 U.S. 41, 48 (1972), this Court reiterated Congress's intent to limit wiretaps to investigations for specific crimes, in order,

> [t]o assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause.

Id. at 48-49 (citation omitted).[7]

Although under *Gelbard*, the consent of one party may justify a wiretap, this Court made clear that Congress never intended for law enforcement agents to use warrantless wiretaps in the context presented in this case:

> Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. *No one quarrels with the proposition that the*

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[7] In *Gelbard*, this Court held that contempt charges for refusing to testify before a grand jury can be defended on the ground that a witness's wiretapped statement was unlawfully obtained under 18 U.S.C. § 2515 (restricting use in legal proceedings of communications obtained in violation of this chapter).

> *unauthorized use of these techniques by law enforcement agents should be prohibited* . . . . Only by striking at all aspects of the problem can privacy be adequately protected.

Gelbard, 408 U.S. at 50 (citation omitted) (emphasis added). The Ninth Circuit's decision conflicts with this Court's precedent and disregards Congress's intent.

2. The Ninth Circuit Contravened The Seventh Circuit

The Media disregard this Court's precedents and Congress's intent to protect the privacy rights of individuals. The Media argue that they are exempt from Wiretap Act liability under the "color of law" exemption of § 2511(2)(c) because the Ninth Circuit held that they were "state actors" under *Bivens* and protected by the authority of the search warrant. X/Opp 19-23. In the same breath, however, the Media argue that Agent Scrafford, who wore the Media's hidden microphone and facilitated the interception of the Bergers' private conversations inside the Bergers' residence, could ignore the search warrant requirement of § 2518 of the Wiretap Act because Agent Scrafford was not acting as a Government Agent when he consented to do so. X/Opp at 22-23 n.24.[8] Agent Scrafford could not "turn-off" his official capacity to serve the private needs of the Media.[9] Agent Scrafford was the Supervising Special Agent for the FWS in Montanta. Hanlon ER 3/¶3. This argument serves only to support the Cross-Petition.

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[8] The Government Agents are silent on Agent Scrafford's participation as the Media's "boom mike."

[9] In making this argument, the Media contradict the Ninth Circuit's decision that they acted "under the authority of the search warrant" and effectively acknowledge that the Ninth Circuit was incorrect. The fact that Agent Scrafford wore the wiretap into the Berger residence which was beyond the scope

The Media argue that the Ninth Circuit's opinion does not conflict with the Seventh Circuit's analysis of the "color of law" exemption under § 2511(2)(c) of the Wiretap Act in *Thomas v. Pearl* on factually distinguishable grounds. X/Opp 19-23. The issue presented, however, is legal. For a wiretap to be under "color of law" for purposes of exemption under § 2511(2)(c),

> there must be some logical and reasonable connection between the government worker's job description and eavesdropping.

Thomas, 998 F.2d at 451.[10]

Here, there was no logical and reasonable connection between Agent Scrafford's job to supervise the execution of the search warrant and the eavesdropping he facilitated inside the Berger residence. Agent Scrafford had no authority to enter the residence, let alone take the Media inside via the microphone, because the search warrant expressly excluded the Berger residence. Agent Scrafford was also required to obtain judicial authority to wiretap because, at all times, he was acting in his official capacity. 18 U.S.C. § 2518.[11] But even if Agent Scrafford applied for authority to wiretap the Bergers, the request would have properly been denied because the crime for which Mr. Berger was under investigation was *not* one of the serious crimes enumerated in 18 U.S.C. § 2516 of the Wiretap Act for which wiretaps are allowed. *See Gelbard*, 408 U.S. at 48-50. It cannot be disputed that Agent Scrafford's conduct was beyond the scope of the search warrant and not

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of the search warrant does not excuse his failure to comply with the Wiretap Act.

[10] The Government Agents acknowledge that the *Thomas* standard is correct. Fed.Opp 8 (quoting *Thomas*, 998 F.2d at 451).

[11] The Wiretap Act, "has as it dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception and wire and oral communication may be authorized." *Gelbard*, 408 U.S. at 49-50.

authorized. *See Bivens*, 403 U.S. at 394. His "consent" was thus not available to give lawfully and not relevant to support any Wiretap Act exemption.

Under the undisputed facts, the Media's joint actions with the Government Agents involving the interception and use of the Bergers' conversations was not lawfully under the authority of the search warrant. By failing to conduct the requisite analysis set forth in *Thomas*, the Ninth Circuit retroactively conferred the Media and Government Agents a general warrant to eavesdrop. *See Berger v. New York*, 388 U.S. at 59. The Ninth Circuit was wrong as a matter of law. *See Benford v. American Broadcasting Companies, Inc.*, 502 F.Supp. 1159, 1162 (D. Md. 1980) (whether ABC acted under § 2511 "color of law" when it entered a private home with congressional aids and eavesdropped was an issue of material fact supporting denial of ABC's motion to dismiss).

3. There Is No Journalist's Exemption

The Media are disingenuous to assert that the 1986 amendment to subsection (d) of § 2511(2) created some sort of blanket newsgathering exemption. X/Opp 13-18. Nothing is further from the truth. The Media erroneously rely on excerpts from a statement in the Senate Report to suggest that the Bergers' interpretation of the Wiretap Act threatens them with criminal liability and is contrary to the First Amendment. X/Opp 3 n.1. That statement, however, was an expression of concerns by the Senate that resulted in the 1986 amendment deleting "injurious" purpose from subsection (d) as a ground for liability because it was unconstitutionally vague.[12] The amendment

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[12] The statement was in the Senate Report but did not become part of the law when the House Bill was passed in lieu of the Senate Bill. *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101, 100 stat. 1848, 1850 (1986), 18 U.S.C. § 2510, *et seq.*

eliminated suits for wiretaps allegedly done for "injurious" purpose as noted in the cases cited by the Media. *See Boddie v. American Broadcasting Companies, Inc.*, 881 F.2d 267 (6th Cir. 1989). However, while the amendment remedied the problem that the Media raise here, it did not create the type of privilege the Media assert. Even the court in *Boddie*, made clear that journalists were not above the law, reminding them that,

> The first amendment of course does not immunize wrongful behavior simply because it is undertaken in the name of newsgathering. Media defendants do not have a privilege to place unlawful wiretaps.

Id. at 271.[13]

The second exemption of § 2511(2)(d) was not applied by the Ninth Circuit and did not apply to exempt the Media. The First Amendment does not exempt liability where the purpose of the Media's wiretap was not only to record "sound bites" but to trespass and invade privacy to do so.[14] That the Bergers' sued the Media for intentional infliction of emotional distress was a sufficient allegation of tortious purpose. *See Boddie*, 881 F.2d at 268 & n.1 (affirming the jury's preclusion of plaintiff's claim that ABC acted with criminal or tortious purpose under § 2511(2)(d) where the plaintiff did not argue until the first time on appeal that defendants' actions constituted intentional infliction of emotional distress); *see also Benford*, 502 F.Supp. at 1162 (whether media's purpose for eavesdropping was criminal or tortious, or had a [pre-1986 amendment] injurious purpose, is an issue of material fact).

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[13] In *Boddie*, ABC, a producer and reporter were sued for surreptitiously videotaping and broadcasting the interview of a witness in a judicial corruption investigation who refused to appear on camera.

[14] As discussed, *supra*, Agent Scrafford did not have the authority to "consent" to the Media's wiretap.

Here, the Media had several unlawful purposes for the wiretap including: (1) to intercept information from the Government Agents about an investigation which was confidential, (2) to intercept the Bergers' interrogation by the Government Agents, (3) to trespass on the Bergers' private property, (4) to trespass in the Berger's private residence, (5) to invade the Bergers' privacy and (6) to gather useful "sound bites" for the Media's program. Under the facts and circumstances, the Media's purpose was not benign newsgathering. *See Silverman v. United States*, 365 U.S. 505, 511 (1961) (eavesdropping by trespass violates the Fourth Amendment); *see Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (the First Amendment is not a license to trespass, steal, or to intrude by electronic means into the precincts of another's home or office).

ENJOINING ADJUDICATED WRONGFUL CONDUCT IS NOT A PRIOR RESTRAINT

The Media are not correct in arguing that the Bergers claim that there has been a final determination of the Media's wrongdoing. X/Opp 23-28. The question for this Court is to review denial by the courts below of the Bergers' request to enjoin the Media's future and perpetual use of the outtakes of the video and audio tapes, in whole or in part, when and not before there is a final determination of the Media's wrongdoing. *See Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Galella v. Onassis*, 487 F.2d 986, 994-995 (2d Cir. 1973).

CONCLUSION

For the reasons set forth in this Reply and the Cross-Petition, the Bergers respectfully request that if the Media's Petition for Writ of Certiorari is granted, that this Cross-Petition be granted as well.

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